MUNICIPAL BOARD DECISIONS

VOLUME SEVEN-A/1988

Nova Scotia

Municipal Board

MEMBERSHIP OF NOVA SCOTIA MUNICIPAL BOARD

CHAIRMAN: MICHAEL G. JOHNSON, C.A.

VICE-CHAIRMAN: LINDA D. GARBER, LL.B.

MEMBER: RICHARD L. WELDON

TERM O.I.C. APPOINTMENTS: R.H. BLOIS, Q.C.
ELIZABETH SALTON

****

DOREEN A. FRIIS — Clerk

CLYDE A. PAUL, LL.B. — Counsel

THIS VOLUME CONTAINS ALL ASSESSMENT DECISIONS FROM JANUARY 1, 1988, TO DECEMBER 31, 1988.

THESE DECISIONS ARE PUBLISHED PURSUANT TO SECTION 44(1) OF THE MUNICIPAL BOARD ACT, CHAPTER 9, STATUTES OF NOVA SCOTIA, 1981.

ASSESSMENT

CASE TABLE

Adsheen Properties Ltd. v. Director of Assessment (N.S.) 17

Branch Developments Ltd. v. Director of Assessment (N.S.) 89

Director of Assessment (N.S.), Adsheen Properties Ltd. v..........17

Director of Assessment (N.S.), Branch Developments Ltd. v..........89

Director of Assessment (N.S.) v. Eascan Developments Corp. Ltd..........246

Director of Assessment (N.S.), Gillard v..........218

Director of Assessment (N.S.), Halifax (City) & Revenue Hotels Ltd. v..........109

Director of Assessment (N.S.), Hotel Nova Scotian v. [See Halifax (City) & Revenue Hotels Ltd. v. Director of Assessment (N.S.)..........109

Director of Assessment (N.S.), Joudrey v..........1

Director of Assessment (N.S.), Levy v..........240

Director of Assessment (N.S.), Maher v..........99

Director of Assessment (N.S.), Revenue Hotels v. [See Halifax (City) & Revenue Hotels Ltd. v. Director of Assessment (N.S.)]..........109

Director of Assessment (N.S.), Roycom Securities Ltd.v.227

Director of Assessment (N.S.), Silver v..........213

Director of Assessment (N.S.), Sproule v..........236

Director of Assessment (N.S.) , Stonehedge Developments Ltd. v..........184

Director of Assessment (N.S.), W.R. Benjamin Products Ltd. v..........31

Eascan Development Corp. Ltd., Director of Assessment (N.S.) v..........246

Gillard v. Director of Assessment (N.S.)...............218

Halifax (City) & Revenue Hotels Ltd. v. Director of Assessment (N.S.)..109

Hotel Nova Scotian v. Director of Assessment (N.S.) [See Halifax (City) & Revenue Hotels Ltd., v. Director of Assessment (N.S.)]...109

Joudrey v. Director of Assessment (N.S.).................1

Levy v. Director of Assessment (N.S.)..................240

Maher v. Director of Assessment (N.S.)..................99

Revenue Hotels Ltd. v. Director of Assessment (N.S.) [See Halifax (City) & Revenue Hotels Ltd. v. Director of Assessment (N.S.)]...109

Roycom Securities Ltd. v. Director of Assessment (N.S.).227

Silver v. Director of Assessment (N.S.)................213

Sproule v. Director of Assessment (N.S.)...............236

Stonehedge Developments Ltd. v. Director of Assessment (N.S.)..184

W.R. Benjamin Products v. Director of Assessment (N.S.).31

ASSESSMENT

STATUTE TABLE

ASSESSMENT ACT, R.S.N.S., 1967, C. 14

s. 1(Naa)
Joudrey v. Director of Assessment (N.S.)..................1

s. 7
W. R. Benjamin Products Ltd. v. Director of Assessment (N.S.)...31

s. 7(1)
Joudrey v. Director of Assessment (N.S.)..................1

s. 7(2), (a), (iii)
Halifax (City) & Revenue Hotels v. Director of Assessment (N.S.)..109

s. 7(2)(b)
Roycom Securities Ltd. v. Director of Assessment (N.S.)227

s. 7(2)(c)
Halifax (City) & Revenue Hotels v. Director of Assessment (N.S.)..109
Joudrey v. Director of Assessment (N.S.)..................1

s. 89(1)
Adsheen Properties Ltd. v. Director of Assessment (N.S.)17

s. 89(1), (a), 92A(1)
W. R. Benjamin Products Ltd. v. Director of Assessment (N.S.)...31

s. 98(1), 99
Adsheen Properties Ltd. v. Director of Assessment (N.S.)17

s. 100(1)
Branch Developments Ltd. v. Director of Assessment (N.S.)89

s. 101
Adsheen Properties Ltd. v. Director of Assessment (N.S.)17

s. 101(1)
Maher v. Director of Assessment (N.S.)..................99

ASSESSMENT

SUBJECT TABLE

Assessment - Commercial - income approach - valuations based on conditions found at date of assessment - capitalization rate - condominium rental investment property
Stonehedge Developments Ltd. v. Director of Assessment (N.S.)...184

Assessment - Commercial - income approach - hotel
Halifax (City) & Revenue Hotels Ltd. v. Director of Assessment (N.S.)...109

Assessment - Commercial - Cost approach - business occupancy - property purchased from government agency after four years on market - effect of previous decisions
W. R. Benjamin Products Ltd. v. Director of Assessment (N.S.)...31

Assessment - Commercial - classification
Joudrey v. Director of Assessment (N.S.).................1

Assessment - Jurisdiction - Notice of Appeal - failure to serve in accordance with statute
Branch Developments Ltd. v. Director of Assessment (N.S.)89

Assessment - Jurisdiction - Notice of Assessment - can Board hear an appeal relating to the jurisdiction of the Regional Assessment Appeal Court
Adsheen Properties Ltd. v. Director of Assessment (N.S.)17

Assessment - Residential - market value - flooding in basement
Maher v. Director of Assessment (N.S.)..................99

JOUDREY v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL - CLASSIFICATION - ASSESSMENT ACT, S.S. 1(Naa), 7(1), 7(2)(c).

This is an appeal by R.A.J. from a decision of the Lunenburg Regional Assessment Appeal Court which confirmed the assessment of $51,900.00 and the classification of commercial. The property is a town-type "residential" lot with a two-storey older type house. The building is occupied by a business owned by the Appellant and his Wife. The property is zoned residential and its business use is permitted by a development agreement. No one resides in the property.

HELD: The Appeal is dismissed. The property is commercial property and not residential. No costs are awarded.

Commercial property is a residual type of assessable property which is not resource property or residential property.

NSMB-152-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **ROBERT A. JOUDREY** from a decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region, dated June 18, 1987, confirming the assessment under the commercial classification for the Appellant's property located at 177 Aberdeen Road, Bridgewater, Nova Scotia.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: KENNETH O. THOMAS, on behalf of the Appellant, Robert A. Joudrey;

RANDALL R. DUPLAK, Q.C., on behalf of The Director of Assessment.

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, Municipal Board Act, the Chairman assigned Board Member, Richard L. Weldon to hear this assessment appeal at the Board's January 12, 1988, sittings at the Council Chambers, Municipal Building, 210 Aberdeen Road, Bridgewater, Nova Scotia.

This is an appeal commenced by a "Notice of Appeal" signed by **ROBERT A. JOUDREY** from a decision dated June 18, 1987, of the Regional Assessment Appeal Court, Lunenburg Assessment Region, for certain properties stated therein as being "land, building - 177 Aberdeen Road, Bridgewater" whereby that Court refused the appeal before it of the Appellant Robert Joudrey.

The decision was mailed by the Regional Assessment Appeal Court on June 19, 1987, and was received by the Appellant on or about July 9, 1987.

The Notice of Appeal to the Board was served on all persons required to be served pursuant to Section 100(1) of the Assessment Act, R.S.N.S. 1967, Chapter 14, on or about July 9th, 1987, and it was filed with the Municipal Board on or about July 13, 1987. The evidence disclosed that there was another assessed owner of the property, namely the wife of the Appellant and she was served a Notice of Appeal since she had typed the letter constituting the "Notice of Appeal" and therefore was fully conversant with the contents of the Notice of Appeal. There was a tenant occupying the premises by the name of Joudrey Appraisals and Consultants Limited, a body corporate, a corporation which seems to be owned solely by the Appellant and his wife and it received notification of the commencement of the proceedings and Notice of Appeal through the common knowledge and directorship of the Appellant and his wife. On hearing the vive voce evidence of Mr. Joudrey and counsel for the Director consenting, the Board is satisfied that the Notice of Appeal was served within the time and upon all the persons prescribed by the Assessment Act. The Board is further satisfied that the Notice of Hearing had been served upon all persons required to be served therewith and that notification of commencement of proceedings and all other jurisdictional procedures had been performed by the Appellant in order to give the Board jurisdiction. The Board therefore assumed jurisdiction to hear this appeal.

The history of the assessment giving rise to this appeal is not too germane to this particular appeal. The issue between the parties was stated in the Notice of Appeal and (as was demonstrated in the evidence) dealt with the classification of the property and whether it should be a residential classification as alleged by the Appellant or whether it should be a commercial classification as had been set by the Assessor and confirmed by the Regional Assessment Appeal Court in the following terms:

"Assessment and classification confirmed".

The Appeal was heard on November 10th, 1987, starting at 10:30 o'clock in the forenoon at the place mentioned above.

Counsel for the Respondent Director filed an estimate of valuation and classification before the Board, Exhibit J-5.

The assessor had set the valuation of the subject property at $51,900.00 and the Appellant does not dispute this amount. This value is effective as of January 1, 1986 being the date determined by the Director for setting assessment values for the 1987 assessment year. The Board will assume, although it is not expressly stated in any evidence before it except by the consent of two of the parties to the valuation, that the appropriate adjustment has been made to assure that this agreed assessed value has been set with due regard to the general level of assessment of residential and resource property in the Lunenburg Assessment Region.

That report, Exhibit J-5, accurately describes the subject property as follows:

> "The subject property is located in the Town of Bridgewater and on the eastern side of the Lahave River, which runs through the Town in a northerly direction. More specifically the subject is situated on Aberdeen Road in a neighbourhood that is still predominantly single family residential as dictated by the Zoning By Laws.
>
> However, just west of the subject property and still on Aberdeen Road, recent years has seen much Commercial activity such as a convenience store, take-out restaurant, law office, doctors office, real estate offices and credit bureau.
>
> Aberdeen Road is fully serviced with municipal water and sewer, paved street, curb and sidewalk. The neighbourhood has the benefits of Town Police and Fire Protection as well as weekly garbage collection.
>
> The subject property is within walking distance of most amenities and there is easy access to other points in the town as well as the Trans Canada Highway and outside destinations."

The building on the subject property (which was viewed by the Board in a cursory manner) which is shown both in a description in Exhibit J-5 and in a plan therein appears to be from its outside, a two-storey older type house on a town-type "residential" lot abutting Trunk Highway No. 3A which at this place looks very much like a Town "residential" street. The lot itself is approximately 70' x 200'.

The report, Exhibit J-5, also states that the classification was made as of January 1, 1987 and that the report would deal with the state of the property as of December 1, 1986. Regardless of the correctness of these times, the property throughout was occupied by the corporation of the Appellants (Joudrey Appraisals and Consultants Limited) as an appraisal consulting business. The property was zoned R-1 throughout and was alleged to be subject to a development agreement (forming a portion of Exhibit J-5) and dated January 14, 1986. The Development Agreement was between the corporation, Joudrey Appraisals and Consultants Limited, and the Town of Bridgewater. The position of the Appellant is that the regularity of this particular development agreement is not to be questioned by this Board and was in fact not questioned either by the Appellant or the Respondent Director as to its validity. Both contended the Development Agreement was valid. The Board notes however that the Development Agreement was clearly not with the assessed or actual owners of the subject property, Mr. and Mrs. Joudrey. In its recitals the Development Agreement alleged that the Joudrey corporation was the owner.

Mr. Robert A. Joudrey gave the sole evidence for the Appellant. He conceded that the valuation of the subject property made by the assessor was correct. He stated that he had bought the property after first inquiring as to its zoning status at the District Planning Commission and being there informed that the property was in a commercial zone.

Mr. Joudrey said that it was his corporation's original intention to develop the subject property in a commercial manner and to install offices therein both for itself and for a national life insurance company, Standard Life. Sometime during the process of closing the sale of the subject property, Mr. Joudrey discovered that the property was zoned R-1 which would not permit his intended uses which he had adopted when he decided to buy the property. Mr. Joudrey closed the sale of the subject property regardless. He sought and obtained (by a very narrow margin of majority in Bridgewater Town Council) a Development Agreement with the Town which he says (and the Director agrees) permits the development and use now on the property, namely Joudrey Appraisal and Consultants Limited, an appraisal and consulting business.

Mr. Joudrey said the house on the subject property had been built perhaps 100 years ago and had always been used as a residence prior to its purchase by him. When he purchased the property Mr. Joudrey was not allowed to change the exterior except for a small 1' x 2' or 1' x 3' business sign. He said that the company was strictly limited under the Development Agreement to use the subject property as its only commercial use of the premises, for an appraisal and consulting business. Mr. Joudrey stated that these restrictions would gravely limit his ability to sell the subject property as a commercial property although it is still permitted to revert back to its zoned R-1 uses under the terms of this Development Agreement which is considered valid by both parties before the Board.

Mr. Joudrey says that he has no objection that the property receive a business occupancy assessment because that is how it is presently occupied and was occupied at all times relevant to this appeal. Mr. Joudrey objects, however, to paying a commercial rate of tax based upon a commercial assessment on the real property. He says that the property is essentially still residential because of the zoning and because of the extreme limitations on the commercial uses to which the property may be put (and to which in fact it is being put) and because of the "residential" appearance of the building on the subject property.

Mr. Lynn E. Wamboldt, Senior Assessor, gave evidence for the Director and was the sole witness for the Director.

Mr. Wamboldt said that he had examined the property and at all times when he saw it it was being occupied by the appraisal and consulting business of the corporation mentioned and that it was furnished mostly with office furniture. From his observations, Mr. Wamboldt concluded that the subject property was not residential property, it was not resource property, that it was assessable property and therefore it had to be assessed as commercial property within the meaning of the Assessment Act.

Mr. Wamboldt also noted that in the ordinary meaning of the word "commercial", the subject property was used as a business operation and that there was no residential use in any portion of the building.

Mr. Wamboldt was qualified as an expert appraiser entitled to give opinion evidence on assessment matters in Bridgewater. Mr. Wamboldt gave the Board the opinion that on his interpretation of the Assessment Act it was impossible for there to be a business occupancy assessment on a property if the entire basic property assessment were residential. He also noted that there were provisions in the Assessment Act, if the use is changed during the assessment year, for changing the commercial portions of the assessment.

There were no facts in dispute in this appeal.

The Board, because of the consent of the parties that the development agreement was valid and binding in this particular case, will accept that position if it becomes germane to this decision. The Board, however, wonders how there can be a valid Development Agreement when the actual and assessed owners of the subject property were two individuals other than the corporation which signed the Development Agreement and the corporation which signed the Development Agreement was never the owner of the subject lands.

In any event, Mr. Wamboldt said he made his classification of the subject property without reference to the Development Agreement. Mr. Wamboldt said his later perusal of the Development Agreement merely confirmed the commercial classification of the subject property that he had already made.

The Board agrees clearly with Mr. Joudrey that the outside of the building on the subject property looks (especially with the snow down as it was the day the Board viewed the site) as just another "residential" house on a "residential" street with a small business sign (somewhat difficult to read from the road). Because of the nature and construction of this business sign it looks very similar to the personal "residential" sign that some people put on the front of their residences when they express who the owners are, for example:

"The Jones". (written in script).

The interior of the building according to both witnesses was used for and occupied as a business office only although some of the bathroom and kitchen fixtures are still in place holdovers from the last residential use of the subject property. No one resided in this property at any time relevant to this appeal.

The Board has a duty to hear the appeal de novo under Section 101 of the Assessment Act.

The amounts involved in the appeal depending on whether the Appellants result is arrived at or the Director's position is confirmed is approximately $1,372.76 in the year 1987. The difference in the rate in the area between commercial and residential is approximately $1.00 per $100.00. The business occupancy assessment would be at 50% of the commercial rate on this particular property thus the Board estimates that if the property were assessed as residential there would be no business occupancy assessment and the tax bill to the Appellant would be almost $1,400.00 per annum (in 1987 terms) less taking into account the difference in rate between commercial and residential assessments and the imposition of the business occupancy assessment which automatically follows the commercial assessment.

The Board notes that Section 7(1) of the Assessment Act deals with what kind of property must receive a business occupancy assessment:

> "In addition to any assessment of property under this Act, every person occupying or using any commercial property except
>
> (a) forest property;
>
> (b) structures other than buildings, not providing shelter for people, plant or moveable property, and all machinery, equipment apparatus and installations other than those for providing services to buildings, whether or not the same are affixed to land and buildings;
>
> (c) property of a municipal water utility, occupied by the utility;
>
> shall be assessed for a sum to be called "business occupancy assessment"."
>
> Section 7(2)(c):
>
> "in a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)."

It is clear to the Board that unless the basic property here is zoned commercial in whole or in part, there can be no business occupancy assessment on the Appellant's property. The Appellant's position that he is willing to pay a business occupancy tax is incorrect if his premise is correct that his property should be classified solely as residential.

In this particular case, if the assessor is correct and if the property is correctly classified as commercial, then the other tax consequences stated above would follow: these are the two clear positions here, only one of which the Board may choose.

The Director has a duty with the assistance of assessors, to prepare the assessment roll pursuant to the following sections of the Assessment Act:

> "23 The director with the assistance of the assessors having ascertained as nearly as he can the particulars of the property to be assessed shall prepare the assessment roll in which shall be set down
>
> (a) the location and a concise description of each separate piece of assessable property, with the name and address of the owner thereof;
>
> (b) the assessed value and classification of each lot or piece of assessable property in such detail as the assessor may determine;...
>
> 25(1) All assessment shall be designated as being residential property, commercial property or resource property, or partly one and partly another;
>
> (2) Where a property is in part one of, and in part another one or more of, residential property, commercial property or resource property, the value of each such part shall be entered on the roll. ...
>
> 38(1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the Director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial property in the town or municipality.
>
> (2) The Director may from time to time prescribe a past date as a base for the determination of the market value of a property for the purposes of subsection (1).
>
> (3) Notwithstanding subsections (1) and (2), the assessment of a property shall reflect its state as of the date referred to in subsection (1A) of Section 64.
> ...
>
> 64(1) On or before the thirty-first day of December

in each year, the director shall complete the roll and

(a) complete and sign a certificate in Form B in the Schedule and attach it to the roll; and ...

(1A) The assessment shown on the roll shall be the assessment that reflects the state of the property as it existed on the first day of December immediately preceding the filing of the roll.

1 In this Act,

(a) "assessable property" means:

(i) land and land covered by water;

...

(v) buildings and structures erected or placed upon, in, over, under or affixed to land, including buildings and structures under construction or partially constructed;

...

(ca) "commercial property" means all property or part thereof except residential property and resource property, and includes the forest property owned by a person who owns fifty thougsand acres or more of forest property in the Province;

...

(n) "ratepayer" means a person liable to taxation under this Act;

...

(naa) "residential property" means property or part thereof used or intended to be used for residential purposes, but does not include the portion of a hotel or motel used for the purpose of loding for the public;

(nb) "resource property" means:

...

(ii) forest property owned by a person who owns less than fifty thousand acres of forest property in the Province;

. . .

> (iv) community fishermen's service buildings, occupied and used by boat owners who are licensed commercial fishermen, and the land used in connection therewith;"

It is clear to the Board that commercial property is a residual type of assessable property which is not resource property or residential property.

On the facts of this case it is beyond question that the subject property is not resource property.

The subject property can only be residential property if it falls within the phrase "or intended to be used for residential purposes" since it is clearly not now being used for residential purposes although the Board admits it is readily capable both by zoning and by building construction to be converted back to that use.

The Appellant has stated no clear intention that he intends to put the subject property back to residential uses. His clear intent in the past was to convert it from a residence to a dual office and when that failed (because of certain mistakes which are not germane to this appeal), to convert the building into offices for use in his own consulting business. The Development Agreement (however effective it may be) is also an objective manifestation of that intent. Mr. Joudrey had to persist for some considerable time over considerable obstacles to achieve the political result of a Development Agreement. Mr. Joudrey's company has at all relevant times to this appeal (and whatever those times may be) occupied and used the premises as a business or, phrased another way, has put them to a use other than residential.

The use of the comparables in Exhibit J-5 by the senior assessor, Mr. Wamboldt, showed that it was possible in at least two other occasions in Bridgewater to have, by Development Agreement, office buildings constructed in R-1 zones. The Board does not think that the comparables can be used for any other comparison in this particular case since they were new construction designed specifically for the purposes for which they are used (and which the Development Agreement envisaged) whereas the subject property was a minor renovation of a residence to convert its interior only into the commercial or business use to which it is now being put. The Board uses "business purpose" to distinguish from "commercial purpose" since there is a tortured meaning to "commercial" expressed in the Assessment Act.

The Board finds that the demised premises at all times relevant to this appeal were being put to a business purpose as opposed to any residential purpose. The Board finds that at any time relevant to this appeal the Appellant had no intention of using the subject property as a residential property.

By definition therefore the property, not being a resource property and not being a residential property within the meaning of the Assessment Act, and since it is assessable property it must be commercial property and assessed as such.

There has been no claim for any assessment or tax exemption in this appeal and no claim on the evidence for such exemptions could be sustained.

The Board therefore dismisses the appeal.

The Appellant was not asking for costs should he have succeeded. In return the Director, in argument, said that since the Appellant was not asking for costs should he succeed, the Director was not asking for costs should he succeed.

In view of such representations there will be no costs ordered.

An Order dismissing the appeal will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 20th day of January, A.D., 1988.

RICHARD L. WELDON,
Member.

NOVA SCOTIA MUNICIPAL BOARD.

ADSHEEN PROPERTIES LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION - NOTICE OF ASSESSMENT - CAN BOARD HEAR AN APPEAL RELATING TO THE JURISDICTION OF THE REGIONAL ASSESSMENT APPEAL COURT - ASSESSMENT ACT, S.S. 89(1); 98(1); 99; 101.

This is an appeal by A.P. Ltd. from a decision of the Cumberland Regional Assessment Appeal Court which dismissed an appeal because the Appellant had failed to show cause for late filing of a Notice of Dissatisfaction. The Board's hearing was limited to arguments on the issue of jurisdiction and to testimony respecting the reasons for the late filing.

HELD: The Appeal is dismissed without costs.

The Board does not have jurisdiction to hear an appeal which relates to a decision of the Regional Assessment Appeal Court as to its jurisdiction to hear an appeal on the merits. See MacKay v. Dir. of Ass. (1984) 3-A M.B.D. 303 and Ballou et al v. Dir. of Ass. (1984 3-A M.B.D. 375 which was affirmed on appeal 166 A.R. 73. Board noted that phrase "Notice of Assessment" in s. 98(1) applies to all notices of assessment whether the original or amended and that a person should be permitted to file a late Notice of Dissatisfaction.

NSMB-155-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S., 1967, Chapter 14, as amended;

- and -

IN THE MATTER OF: An Appeal by **ADSHEEN PROPERTIES LIMITED** from the decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, dated July 22, 1987, respecting a decision relating to the cause for a late filing of a Notice of Dissatisfaction.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: DAVID H. CHRISTIE, LL.B., for the Appellant;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

DECISION

A hearing was held on December 8, 1987, in the Council Chambers of the Municipality of the County of Cumberland, Upper Nappan, Nova Scotia, for the purpose of hearing arguments relating to the jurisdiction of the Board to hear an appeal by **ADSHEEN PROPERTIES LIMITED** from the decision of the Regional Assessment Appeal Court, Cumberland Assessment Region, dated July 22, 1987, which refused acceptance of the reasons for late filing of a Notice of Dissatisfaction. This hearing was held as a preliminary to any hearing of the appeal issues on their merits. The Notice of Appeal was dated August 14, 1987, and received by the Board, August 17, 1987. In essence the ground for the appeal was that the Chairman of the Regional Assessment Appeal Court failed to consider or give proper weight to the reasons for late filing as set out by the Appellant.

The facts of the case are very simple and are not in dispute. The Appellant had appealed its original Notice of Assessment. Pursuant to this the Director had issued an Amended Notice of Assessment on May 19, 1987, which was received by the Appellant on May 22, 1987. On June 1, 1987, the Appellant filed a Notice of Dissatisfaction which was outside the seven days allowed by Section 84(5) of the Assessment Act, R.S.N.S. 1967. The Regional Director of Assessment for Cumberland County informed the Appellant that he could prepare an affidavit or give evidence under oath as to the reasons for late filing of the Notice of Dissatisfaction. This affidavit was filed by the Appellant's solicitor on June 8, 1987. On July 22, 1987, the Regional Assessment Appeal Court rendered its decision indicating that the Appellant had failed to show cause for late filing and the Appeal was dismissed. Notice of this decision was received by the Appellant and his solicitor on July 28, 1987. It is this decision that is being appealed to the Board.

The actual Notice of Appeal received by the Board was somewhat confusing since it stated that it was an appeal from a decision of the Director of Assessment for which there is no provision in the Assessment Act. This was subsequently corrected by Counsel for the Appellant by a letter received by the Board on August 28, 1987, which stated that the Notice of Appeal should have read "from a decision of the Regional Assessment Appeal Court". Counsel for the Appellant argued that the inadvertent reference to the Director of Assessment in the Appellant's Notice of Appeal was not of such magnitude as to create a lack of jurisdiction in the Nova Scotia Municipal Board to hear this appeal. Counsel for the Director indicated that the Director was not objecting to the Board's jurisdiction on this basis. On review, the Board is of the opinion that this error in the Notice of Appeal is not significant enough so as to create a lack of jurisdiction of the Board to hear this appeal. The Notice of Appeal was sufficient to meet the requirements of Section 100 of the Assessment Act.

Counsel for the Director submitted an affidavit from Carolyn Dugan, Recorder for the Cumberland Assessment Appeal Region, (Exhibit A-1) which basically confirmed the facts of the appeal.

Counsel for the Director then reviewed his memorandum of law (Exhibit A-2) prepared for the hearing and received by the Board on December 4, 1987. The memorandum dealt with the Director's specific objection to the Board's jurisdiction to hear the appeal. After a brief adjournment to allow

Mr. Christie time to read the report and after a brief verbal rebuttal of the points raised, counsel for the Appellant requested a week in which to prepare a formal written response to the report. Mr. Duplak also asked for time to respond if necessary. The requests were granted by the Board. A memorandum was received from Mr. Christie on December 18, 1987 by the Board stating his case on behalf of the Appellant. On the same day Mr. Duplak indicated that he would not be filing a brief in rebuttal.

Prior to adjournment of the hearing testimony was heard from Siraj Husain on behalf of Adsheen Properties Limtied, who stated the reasons for the late filing of the Notice of Dissatisfaction.

On review of the testimony and briefs it appears to the Board that there is one main issue of jurisdiction to be determined and that is: "Does the Nova Scotia Municipal Board have jurisdiction to hear an appeal relating to a decision of the Regional Assessment Appeal Court as to its own jurisdiction to hear that appeal?"

The Sections of the Assessment Act relating to this issue are Section 99; Section 101; Section 89(1) and Section 98(1):

> "99. Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board.
>
> ...
>
> 101(1) The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine

such witnesses and take all such proceedings as are requisite for a full investigation of the matter.

(2) On the appeal the Board shall have all the powers of the regional assessment appeal court.

...

89(1) On any appeal, the court may

a) confirm, reduce or increase the valuation of the property that is the subject of the appeal, and confirm, reduce or increase an occupancy assessment notwithstanding that the occupancy assessment was not appealed;

aa) dismiss the appeal;

b) add to the roll the name and assessment of any person left off the roll;

c) strike off the roll the name of any person wrongfully entered thereon;

d) transfer the assessment to the proper person when any property has been assessed in the name of a person who is not legally liable to be assessed therefor;

e) when any person has been assessed more than once, strike out the assessment that is improper or illegal;

f) change the classification of all or part of the property that is the subject of the appeal; and

g) correct any clerical errors made by the assessor in the assessment roll.

...

98(1) If any person shows, within sixty days from service of the notice of assessment by oath or affidavit on ex parte application, to the satisfaction of the Regional Assessment Appeal Court [regional assessment appeal court], that he has been prevented by absence, illness or other sufficient cause from appealing from the assessment, or from duly prosecuting his appeal, the Court [court] may grant such person a hearing and arrange a sitting of the Court [court] to

> hear the appeal; the Court [court] may impose such terms as to notice and service of documents as it considers proper."

Section 99 would appear to give a right of appeal to this Board from the decision of the Regional Assessment Appeal Court. However, a careful review of Sections 101 and more particularly 89(1), indicates that the Board's powers may be limited to matters of the assessment roll and assessments related thereto. A review of case law and previous decisions of the Board submitted by the Counsel for the Director appears to support this position.

The facts in Raymond MacKay v. Director of Assessment (1984) 3-A NSMB 303, are somewhat similar to the present case. The Appellant was appealing the decision of the Regional Assessment Appeal Court relating to a decision made under Section 98(1) of the Assessment Act concerning late filing of a Notice of Appeal. In its decision relating to this case the Board stated the following: (at pages 322-324)

> "The specific statutory powers enjoyed by the Board do not in the opinion of the Board include the power to review a decision of a regional assessment appeal court in dismissing an appeal because of a lack of jurisdiction as for example the late filing of a Notice of Appeal. However, the wording of Section 99 of the Assessment Act gives the Board some considerable concern as it clearly and unambiguously provides for an appeal to the Board from a "decision" of the assessment appeal court. The word "decision" is defined in Black's Law Dictionary 5th ed. as, "a determination arrived at after consideration of facts, and in legal context, law" and also as "a determination of a judicial or quasi judicial nature". It would therefore follow that the determination made by the Regional Assessment Appeal Court on March 23, 1984, was a "decision".

The issues raised in this appeal are novel ones and there does not appear to be any precise determination by any court of competent jurisdiction on these issues. The Board takes the view that the "decision" of the Regional Assessment Appeal Court dismissing the Appellant's appeal, presumably on the basis that the Notice of Appeal was not filed within the statutory time limit and that the circumstances were not such that the Regional Court would exercise its discretion under Section 98(1) of the Assessment Act to hear the appeal, is a decision which is not appealable to this Board under the provisions of Section 99 of the Assessment Act.

Section 99 of the Assessment Act reads as follows:

"Any person aggrieved by a decision of the assessment appeal court, including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board".

The Appellant is certainly "a person aggrieved by a decision of the assessment appeal court..." and as such he should ostensibly have the right to appeal to this Board the decision causing him to be aggrieved. However, the Board is of the opinion that the decision in question made by the Regional Assessment Appeal Court is not a decision contemplated by Section 99 of the Assessment Act which is appealable to this Board. The decision made by the Regional Assessment Appeal Court was a decision relating to that Court's jurisdiction to hear the appeal on the merits and the Regional Court having undisputed authority and power to determine its own jurisdiction, exercised that authority by dismissing the appeal because of late filing of the Notice of Appeal and the Regional Court refused to exercise its discretion under Section 98(1) of the Assessment Act by allowing the appeal to be heard.

For this Board to assume jurisdiction to hear evidence as to whether or not the Regional Assessment Appeal Court properly and legally dismissed the Appellant's appeal to be heard on the merits would be in effect a judicial review of the Regional Court's decision which in the opinion of the Board is a function reserved to a superior court judge and is beyond the jurisdiction of this Board.

This Board has duties to perform which are set

> forth in the Municipal Board Act and in various statutes conferring jurisdiction on the Board. The Board's powers to carry out its duties are set forth in these various statutes. These powers do not include the power to review a decision of a Regional Assessment Appeal Court on a question of that Court's jurisdiction to hear an appeal."

This case was referred to in William Ballou and Robin Ballou v. Director of Assessment (1984) 3-A NSMB 375, and which was confirmed on appeal by the Supreme Court of Nova Scotia, Appeal Division, at (1986), 166 A.R. 73. Although the facts of the case are somewhat different, the matters relating to jurisdiction were not. In rendering its decision the Board confirmed the decision in the MacKay case and stated the following:

> "In the opinion of the Board, a decision made by the Regional Assessment Appeal Court relating to its jurisdiction to hear an appeal on the merits is not a decision contemplated by Section 99 which is appealable to this Board.
>
> The Appellants' first ground of appeal is that the Regional Assessment Appeal Court erred by finding that it had no jurisdiction to hear the merits of the appeal. If this Board heard evidence with respect to this ground of appeal it would be in effect undertaking a judicial review of the Regional Court's decision which in the opinion of the Board, is a function of a Superior Court Judge and not a function of this Board on appeal pursuant to Section 99 of the Assessment Act."

The Supreme Court of Nova Scotia Appeal Division in upholding the Board's decision made the following comment in its own decision:

> "In our opinion, therefore, the Regional Assessment Appeal Court erred in declining jurisdiction to hear the appellants' appeal. The right of appeal, however, from the decision of the Regional Assessment Appeal Court to the Municipal Board is, in our opinion, restricted to decisions made within jurisdiction and does not therefore extend

> to the jurisdictional error made here by the Regional Assessment Appeal Court. Such error, in our view, can only be challenged by way of the prerogative remedies."

Counsel for the Appellant argued that the above cases would only apply to this appeal, if the Regional Assessment Appeal Court had refused to hear the application for late filing under Section 98(1) of the Assessment Act. He states "If the Regional Assessment Appeal Court has jurisdiction to hear the application of the Appellant pursuant to Section 98(1) of the Assessment Act, then it follows that the Nova Scotia Municipal Board has the jurisdiction to hear an appeal from the decision of the Regional Assessment Appeal Court. Section 99 of the Assessment Act clearly permits such an appeal."

The Board does not agree with this interpretation. The MacKay case clearly relates to a decision of the Regional Assessment Appeal Court to refuse to hear an appeal because of insufficient grounds for a late filing under Section 98(1) of the Assessment Act. This is clearly by a jurisdictional decision of the Regional Assessment Appeal Court.

In light of the foregoing, it is the opinion of the Board that the Board has no jurisdiction to hear this appeal as the appeal relates to a decision of the Regional Assessment Appeal Court as to its jurisdiction to hear an appeal on its merits.

Counsel for the Director raised a second issue for the Board to consider. Mr. Duplak contended that Section 98(1) of the Assessment Act is not applicable to the filing of a Notice of Dissatisfaction pursuant to Section 84(5) of the Assessment Act. He argues that the Chairman of the Regional Assessment Appeal Court was in error to hold a hearing to even hear the arguments for an extension of late filing of a Notice of Dissatisfaction.

The relevant Sections of the Assessment Act state as follows:

> "98(1) If any person shows, within sixty days from service of the notice of assessment by oath or affidavit or ex parte application, to the satisfaction of the Regional Assessment Appeal Court [regional assessment appeal court], that he has been prevented by absence, illness or other sufficient cause from appealing from the assessment, or from duly prosecuting his appeal, the Court [court] may grant such person a hearing and arrange a sitting of the Court [court] to hear the appeal; the Court [court] may impose such terms as to notice and service of documents as it considers proper.
>
> 84(5) When an amendment has been made under this Section, the appellant and the respondent shall, if either of them is dissatisfied, serve notice in Form F in the Schedule on the recorder and on the opposite party within seven days after service under subsection (4) and if no notice is so served, then the appeal shall be deemed to have been abandoned."

Counsel for the Director argues that Section 84(5) of the Assessment Act is quite specific and does not provide for an extension or reasons for extending the time for filing a Notice of Dissatisfaction by virtue of the inclusion of the phrase "within seven days".

Counsel for the Appellant argues a number of points regarding this issue. First he maintains that the phrase "Notice of Assessment" as found in Section 98(1) of the Assessment Act applies to all Notices of Assessment whether an original Notice of Assessment or an amended Notice of Assessment. Second he contends that from the documents in evidence (Exhibit A-1) that the Director of Assessment and his employees had a sincere belief that Section 98(1) of the Assessment Act applied to both an Amended Notice of Assessment as well as an original Notice of Assessment. Thirdly he contends that if a person is granted, in a hearing, permission to file a late Notice of Dissatisfaction pursuant to Section 98(1) of the Assessment Act then the appeal shall not be deemed to have been abandoned as prescribed in Section 84(5) of the Assessment Act. He argues that any other interpretation of this sub-section would be too restrictive and unreasonable.

On review the Board, had it jurisdiction, feels that it would be reasonable to assume that the phrase "Notice of Assessment" as found in Section 98(1) of the Assessment Act in fact would apply to all Notices of Assessment whether an original Notice of Assessment or an Amended Notice of Assessment.

The Board notes that from Exhibit D attached to the affidavit of Carolyn Dugan (Exhibit A-1) it is clear that there is a belief by the Director of Assessment that Section 98(1) of the Assessment Act would apply to the late filing of a Notice of Dissatisfaction in that there is a form letter relating thereto for employees of the Department to complete and mail to an Appellant. However the mere existence of the form does not necessarily mean the procedure is correct.

The Board had it jurisdiction would also agree with the submission of Counsel for the Appellant that a person should be permitted to file a late Notice of Dissatisfaction pursuant to Section 98(1) of the Assessment Act and that Section 84(5) is not as restricted as Counsel for the Director argues.

Although the Board may be in agreement with Counsel for the Appellant that the Chairman of the Regional Assessment Appeal Court did have the jurisdiction to consider the application of the Appellant for an extension of filing of a Notice of Dissatisfaction pursuant to Section 98(1) of the Assessment Act, it has previously been determined that the Board does not have jurisdiction to make this determination. To do so would be undertaking a judicial review of a decision which is the responsibility of the Regional Assessment Appeal Court which is a function of a Superior Court Judge.

As the Board has declined jurisdiction to hear the merits of the Appellant's appeal the Board will make no comment on the testimony of Siraj M. Husain, President of Adsheen Properties Limited.

For the reasons previously stated, the appeal is therefore dismissed on the basis that this Board does not have jurisdiction to hear the appeal.

In the circumstances of this case, the Board in the exercise of its discretion dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of March, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD

W.R. BENJAMIN PRODUCTS LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL - COST APPROACH - BUSINESS OCCUPANCY - PROPERTY PURCHASED FROM GOVERNMENT AGENCY AFTER FOUR YEARS ON MARKET - EFFECT OF PREVIOUS DECISIONS - ASSESSMENT ACT, S.S. 7, 89(1)(a), 92A(1).

This is an appeal by W.R.B.P. Ltd. from a decision of the Springhill Regional Assessment Appeal Court reducing the 1987 assessment to $175,000.00. There is a 180' x 160' main plant built in 1968, an adjacent 102' x 150.6' warehouse built in 1970 and a 24' x 98' office on 5.4 acres. The property was purchased from I.E.L. in 1980 for $100,000.00 after 3 - 4 years exposure at $175,000.00. No recent comparable sales.

HELD: The appeal is allowed and the market value for assessment purposes reduced to $171,000.00. The business occupancy assessment set at $65,500.00. No costs were awarded.

The cost approach is the proper method for assessing the subject property. A Government agency is not necessarily a "willing seller" when it negotiates the sale of property. A sale price six years old is not reliable and in any event inflation would result in an increased value. The issue of testing the accuracy of the general level of assessment where there are no relevant sales is discussed. The issue of the Board being bound by its previous decision is reviewed. The Board must consider relevant previous Board decisions in deciding the current appeal. Discusses Nowlan v. Dir. of Ass. (1986), 5-A M.B.D. 185; Nova Scotia Ice v. Dir. of Ass. (1983), 2 M.B.D. 225; National Sea v. Dir. of Ass. (1986), 5-A M.B.D. 129, and various planning decisions.

NSMB-154-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S., 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **W.R. BENJAMIN PRODUCTS LTD.**, from a decision of the Nova Scotia Regional Assessment Appeal Court, Cumberland Assessment Region, dated June 8, 1987, reducing the Appellant's assessment for property and building located at 116 Junction Road, Springhill.

BEFORE: RICHARD L. WELDON, Member.

COUNSEL: W.R. BENJAMIN, on behalf of the Appellant, **W.R. BENJAMIN PRODUCTS LTD.**,

RANDALL R. DUPLAK, ESQ., Q.C., on behalf of the **DIRECTOR OF ASSESSMENT.**

DECISION

Pursuant to Section 16(1) of Chapter 9, S.N.S. 1981, the Municipal Board Act, the Chairman assigned Board Member, RICHARD L. WELDON, to hear this assessment appeal at the Board's February 2, 1988 sittings originally scheduled for the Council Chambers, Provincial/Municipal Building, 29 Main Street, Springhill, Nova Scotia: The sittings were held in that building but in the Boardroom of the District School Board on the 2nd Floor of the same and not in the Council Chambers.

This is an appeal commenced by a "Notice of Appeal" signed by **W.R. BENJAMIN** for **W.R. BENJAMIN PRODUCTS LTD.** from a decision of the Regional Assessment Appeal Court, Assessment Region 51 - Town of Springhill (or that is how it is described in the heading of the decision of the Regional Assessment Appeal Court) of a certain property stated therein as being "Junction Road Factory & Land 116 Junction Road", being an address in the Town of Springhill, whereby that Court allowed the appeal of the Appellant by reducing the assessed value of the building to $175,000.00. On the same date, another decision was handed down concerning this property entitled "Business Occupancy Factory, 116 Junction Road" in which it is said "it is the decision of the Court to reduce the commercial assessment to $67,500.00 for the taxation year 1987".

Both these decisions were mailed by the Regional Assessment Appeal Court on August 6, 1987, and were apparently received by the there and here Appellant on or before August 10, 1987.

The Notice of Appeal to the Board was served on all persons required to be served pursuant to Section 100(1) of the Assessment Act, R.S.N.S. 1967, Chapter 14, on or about and between August 10, 1987, and August 18, 1987, and with the Nova Scotia Municipal Board on August 18, 1987.

The services were proved by the viva voce evidence of Mr. W.R. Benjamin. Mr. Duplak, counsel for the Director, agreed that the Director had been appropriately served and made no objection to any of the other services. The Board is therefore satisfied that the Notice of Appeal was served within time and upon all persons prescribed by the Assessment Act. The Board is further satisfied that the Notice of Hearing and notice of commencement of proceedings had been served on all persons required to be served or delivered with same and that all jurisdictional procedures have been performed by the Appellant in order to give the Board jurisdiction to hear the appeal.

The history of the assessment giving rise to this appeal according to the testimony of Robert A. Hoeg, Senior Assessor, is that the original assessment value for the totality of the package was $184,000.00 of which $40,000.00 was equipment and $144,000.00 was land and building. This matter was appealed to the Regional Assessment Appeal Court the decisions of which are subsequently being appealed here. At the Regional Assessment Appeal Court the land and buildings (which are the only items in dispute today before the Board) were reduced to $175,000.00. Subtracting from that $175,000.00 the amount of agreed equipment included therein, namely $40,000.00, means the result of the Regional Assessment Appeal Court decision allows $135,000.00 for the land and building. These figures are recited in the report of the Senior Assessor being Exhibit W-6, page 7, erroneously as the 1987 assessed value. Listed therein is land $15,000.00, building $120,000.00 and equipment $40,000.00 - total $175,000.00. On explanation by the Senior Assessor, the Board finds that recitation does not reflect the assessment for the year but reflects the decision of the Regional Assessment

Appeal Court. The Appellant is appealing from its successful appeal at the Regional Assessment Appeal Court level.

The Appeal was heard on February 2, 1988, starting at 10:00 o'clock in the forenoon at the place mentioned above.

Counsel for the Respondent Director filed an estimate of valuation previously alluded to as Exhibit W-6. The next expert's report on the matter at hand was made by one Mr. Hardy and is Exhibit W-7. There is no dispute as to the equipment valuation either as to its classification or value which is set, by agreement, at $40,000.00.

The building and land are the source of the dispute in the position between the two parties heard before the Board. The building and land may be described as follows:

> "The plant itself is diagrammed on page 11 of Exhibit W-6. It is described as a main plant, 180' x 160' built in 1968. An adjacent warehouse 102' x 150.6' annexed to the main plant built in 1970 and a Section "A" Office Section 24' x 98' which has no building date set on the diagram."

At page 6 of the said report, the site is described as being:

> "...slightly irregular in shape. The street frontage is 521.1 feet plus 270.4 feet and the area is 5.4 acres...
>
> The land is mainly level and the back of the lot is wet. The lot is partially covered in trees...
>
> The subject site is serviced with water and sewer supplied by the Town. Electricity is provided by the Nova Scotia Power Corporation; Telephone service by Maritine Tel. and Tel. Company Limited; Fire Protection is provided by the Springhill Fire Department."

The date set by the Director for the valuation of the property is January 1, 1986.

Mr. W.R. Benjamin gave the sole evidence for the Appellant. His evidence was short and simple and he said that he had bought the then vacant subject property from Industrial Estates Limited for $100,000.00 in 1980 after the property had been exposed by it as vacant and for sale for some three or four years at $175,000.00 with no takers. He noted that there had been no sales that he knew of like type property in the economically stressed Cumberland Region and certainly none in Town for a long period of time. His position was that the reason there had been no sales was that the market value of this type of property had held steady or reduced in the time interval that he had owned the property and therefore, since the property should be assessed at market value, the best evidence of market value of the subject property, was the sale price that the Appellant had paid for it.

Mr. Benjamin spent some time going through the entire logic process contained in Exhibit W-6; he commended the Senior Assessor for the job that had been done therein. Mr. Benjamin filed his own report (based on the same premises contained in Exhibit W-6) which is contained in Exhibit W-8. In Exhibit W-8 he appended his own opinion on how the depreciated cost approach could be applied to this property and it is set up in photostatic form as Schedule "A" to this Decision. The net result of Schedule "A" is that he is willing to accept the land and building value at $85,388.30.

The Director called as his evidence Mr. Robert Hoeg who qualified himself as a Senior Assessor entitled to give opinion evidence and who basically expanded on his report as to valuation of this property contained in Exhibit W-6.

Mr. Duplak for the Director also called Mr. Charles L. Hardy an accredited appraiser employed by Pat King Appraisals Limited and qualified him as an appraiser who was qualified to give opinion evidence on matters of appraisal and who filed a report called "Treatment of Depreciation" previously mentioned as Exhibit W-7. Mr. Hardy was unable to agree that a property could have a negative or zero value depending on the circumstances of that particular property. He also expressed the opinion that if a property was in use it had to have some value.

The Appellant's evidence is simple and his position is simple. His argument is set out in Exhibit W-8 and the Board will quote fulsomely from that:

> "Building was purchased from Industrial Estates Limited February 1, 1980, for the sum of $100,000.00 land and building.
>
> The building was the former Buckingham Mills property, later taken over by Challenge Mills. Both of these companies went bankrupt.
>
> The building remained empty for a period of approximately 4 years. I.E.L. asking price was $175,000.00 with no takers. Their stated intention was to demolish the building in the summer of 1980 to eliminate the tax burden and the cost of a full time caretaker.
>
> In January of 1980 we made them an offer of $100,000.00 for the property, building and land. This was accepted.

> This history leads us to believe that the market value of the building and land to be $100,000.00. There is no doubt that the length of time the property was offered for sale would establish that $100,000 was the top market value.
>
> The senior assessor conveniently failed to use the direct sales comparison approach, even though this is the approach I feel is preferred by the Assessment Act. I feel this method was not used as it would have proven that industrial properties in the Springhill, Amherst, Oxford area have not increased in value, but have actually decreased in value over the last 8 years..."

Mr. Benjamin, of course, went further and dealt with various defects in his building but basically his argument is that "I paid $100,000.00 for it in 1980, that was a freely negotiated price, that is the market value and there is nothing else to compare it or show that it was either too low or too high".

Mr. Benjamin's submission as to his application of the cost approach figures to the property show a different end result than that arrived at by the Departmental persons and by the Senior Assessor.

The Director has taken the approach (by his Senior Assessor here) that the property is a difficult property to value in that there is a sparsity of sales of comparable properties in the region. With the absence of sales within the Town in recent history, it is extremely dangerous to follow the market data approach to valuation for the land and buildings together. He feels that there is no income approach possible and that the cost of development approach applied by Mr. Hoeg is the only proper valuation approach left for him to follow in these circumstances and that the value Mr. Hoeg arrived at is correct. Mr. Duplak makes the further argument that applying the cost approach there are two or three different results which can be arrived at by applying previous Board decisions to the cost of development approach. These different results flowing from the same basic figures basically depend on how and in what order the various obsolescence factors are to be considered. Mr. Duplak's argument, at its most distilled, attempts to add support to Mr. Hoeg's valuation of $131,000.00.

All parties concede that the Board should, when it comes to a result, calculate the business occupancy assessment based on the assessed value set and the Board will do so later.

In his argument Mr. Duplak applies the cost of development approach to the assessment problems that he says are the nub of this case. The Board thinks, before he can even raise the arguments, he has other arguable assessment issues to resolve. In order to have this Board look at the previous Board decisions and try to rationalize them (as Mr. Duplak seeks to have done) Mr. Duplak must first succeed in overcoming the argument and evidence brought by the Appellant that the market data approach is the best approach to valuation in this case. The Appellant has brought evidence and made his position very clear on this point. If Mr. Duplak does not succeed in overcoming this particular position (once established by the Appellant) then the rest of his reports and arguments need not be considered by the Board since they are not among the options to be selected.

The Board will first then determine whether in this particular case, on the evidence, the market data approach or the cost of development approach or some other combination of valuation approaches ought best to be proceeded with when it determines, de novo, the appropriate assessed value of the subject property.

Before dealing with that issue, the Board would like to deal with the general level of assessment as required by Section 38 of the Assessment Act. That section prescribes that the property values must be set at a market value and that commercial buildings must be valued in such a manner that the taxation of commercial properties falls in an even level across the commercial property in the Town. It is perhaps trite law to say that the courts have interpreted this generally to mean the easiest method of calculation of the general level of assessment of any property is to compare the relevant assessments statistically with arms-length sales transactions of those properties of a like nature concluded within the Town within an appropriate time period. This is a good technique for checking the accuracy of the assessments after they are done to see how they reflect the market.

In this particular case the Board is satisfied on the evidence that there are no sales at any time relevant to allow the subject property to be checked by this technique against other commercial properties in the Town of Springhill in order to determine whether the tax burden will fall equally on them and the subject property. Both parties agreed the only sale mentioned of possibly comparable commercial type of property was not an arms-length transaction. The evidence confirms the correctness of the parties agreement that it is not an arms-length transaction and therefore does not reflect or constitute a sale with which one could safely determine the general level of assessment test as contemplated by the courts. In the absence of such a test that would be relevant to the application, the assessor, and subsequently the Board, must value properties in the Town for assessment purposes having regard to other commercial properties of a like nature in order to ensure that "taxation falls in a uniform manner" on the subject property.

In the type of evidence that was adduced in this case it is quite clear that there are other commercial properties in the Town of Springhill but that none have been sold at any time helpful in the determination of this appeal. Had there been an issue made of uniformity by the Appellant in this particular matter, some other technique might have had to have been devised to find out what was the market values of those properties and how their assessments related to those market values. Once that ratio of market value to assessment value was determined that level (or uniformity ratio) would then be used to test the assessed value of the subject property and adjust that value if necessary, to reflect the general level of assessment.

This general level of assessment issue has not been brought into high profile in this particular case because the Appellant has not raised it and the Director is not prepared to deal with it further than he has. Mr. Hoeg had tried to follow the traditional tests that have been previously used and he has determined, (and the Board agrees) that they can not usefully be applied in this case. The tests advocated cannot be used in this case because, as it is said, there are no relevant sales against which to test assessments.

The Board in this particular case will rely on the presumption of legality, that the assessor knew his job, that his goal is to set an assessment at 100% of market value and in the absence of argument and evidence to the contrary the Board will assume that he has properly done his job in relation to the general level of assessment: the Board will assume the figures arrived at reflect this. The Board, therefore, will deal only with the valuation of the property assuming such figures reflect the application of the general level of assessment of commercial properties in the Town to the market value of the subject property. The Board sees no other way of properly performing its duty in regard to applying the general level of assessment in this particular case than to rely on that presumption of legality. The Assessor had a duty to set the market value and in a certain manner has done so. The Board in no way wishes to preclude other methods of proceeding to set the general level of assessment when the general statistical test outlined above cannot be applied. The Board merely says, in this case, there is nothing else before it on which it can determine the general level of assessment and therefore finds as it has. The Board thanks the counsel for the Director and the witness Mr. Hoeg for honestly bringing this particular issue and all the facts on this particular issue that were available before the Board for its consideration.

The Board now resumes the consideration, among the conventionally accepted approaches, of the conventional approach best to be used on the facts of this case to arrive at the market value of the subject property for assessment purposes. The Appellant's view has been set out in full before and may be summarized as follows:

1. Market data approach. "My" purchase of the property for $100,000.00. Add 10% for the insult (inflation and uncertainty) and come up with a value acceptable to me, namely $110,000.00; or

2. Use the Depreciated Cost Approach figures provided by the assessor, do the calculations based on those figures in the manner "I" have done and provided to the Board and come up with a value of the subject property of $85,388.30 which is a value that is also acceptable to me for assessment purposes.

Mr. Duplak's case presupposed the unavailability of appropriate market information to allow the usually preferred market date approach to valuation to be used in setting the value of the subject property for the present appeal. He further called evidence of two experts that the best approach to arrive at an accurate market value for assessment purposes of the subject property was to apply the cost of development approach calculated by a diminishing balance process as set out by his two experts. These experts disregarded the income approach to valuation of the subject property on the grounds that it in fact yielded no rental and that to try to calculate an "economic rental" for the subject property would lead to a valuation of the Appellant's business and not a valuation of its building and machinery. Mr. Hardy testified that he would be unable to derive an economic rent of the subject property from the income information available from the Appellant sufficiently accurate that he could use that economic rent factor as a basis for calculating the market value of the subject property for assessment purposes by the Income Approach. He felt there were too many factors involved in the Appellant's business which would affect income, had nothing to do with the market value of the subject property, probably could not be identified and extracted from the income statements of the Appellant and thus would so distort the economic rental calculation as to make it inappropriate for use in the assessment process when dealing with the subject property and attempting to value the subject property by the Income Approach.

There was no effort by the Appellant to value the subject property by the Income Approach to value. There was therefore no evidence to contradict that of Mr. Hardy and Mr. Hoeg who had concluded that the Income Approach to valuation was not an appropriate technique to use in valuing the subject property and arriving at its market value for assessment purposes.

In these circumstances, the Board agrees that the Income Approach to valuation was not an appropriate technique to use in valuing the subject property and arriving at its market value for assessment purposes.

In his report on valuation (Exhibit W-6) at page 13 under the general topic heading of **THE THREE APPROACHES TO VALUE** Mr. Hoeg deals with the **COST APPROACH** in these words:

> "This method involves calculating the cost of acquiring a lot and adding the cost of erecting a new building on it. It is most reliable when we are dealing with a new building which has suffered little or no depreciation." [emphasis by the Board]

Even after this statement of principal (regarding the reliability of using the "cost approach" to value any property), the "cost approach" method of valuation of the subject property was used in this case by Mr. Hoeg. Mr. Hoeg also chose to apply the "cost approach" method to a building that was not "new", but 20 years old. He chose to devalue the reproduction costs of the building new of $1,037,149.00. He deducted from that figure a "curable physical depreciation" of $62,924.00 or approximately 6.67% of the reproduction costs of the building new. He then allowed another factor of physical depreciation (71.4%) which he called "Age/Life Depreciation". This depreciation amounted in dollars to $695,596.00.

He then reduced (or "depreciated") the diminishing balance of the reproduction costs of the building new, for "FUNCTIONAL OBSOLESCENCE", by 20% of "this building". This calculation amounted to $547,492.00.

He then reduced (or "depreciated") the diminishing balance of the reproduction costs of the building new for "LOCATIONAL OR ECONOMIC OBSOLESCENCE" by 50% "applicable to the subject improvements". This calculation amounted to $109,652.00.

The net result of this exercise by Mr. Hoeg was a "Depreciated Building Value (rounded to)" of $109,000.00.

That these calculations were all calculations of "depreciation" in the mind of Mr. Hoeg is quite clear from a statement near the bottom of P. 28-A of Exhibit W-6:

> "This method of depreciating improvements is the excepted [sic] procedure used...This is the method I will use in this report to arrive at an estimate of market value."

The net figure Mr. Hoeg arrived at was merely a remainder value of $109,000.00 which the Board calculates to be only 10.5% (approximately) of the initial reproduction costs of the building new. The 89.5% differential between the remainder value and the reproduction costs of the building new results totally according to Mr. Hoeg's report from the various factors which he calls "depreciation".

As noted before, Mr. Hoeg's report seems to start the "cost approach" with the following statement.

> "This method involves calculating the cost of acquiring a lot and adding the cost of erecting a new building on it. It is most reliable when we are

> dealing with a new building which has suffered little or no depreciation." [emphasis by the Board]

Since the building is old (20 years) and since the building according to Mr. Hoeg has suffered at least 89.5% depreciation, the Board (should it apply the principle cited by Mr. Hoeg) could easily conclude the the "cost approach" is being used when it is not at its "most reliable".

The only real value we have to compare to the $109,000.00 building component value arrived at here by applying the "cost approach" to value of the subject property is the value shown for 4 years prior to 1980 of $175,000.00 being an exposure sale price which did not lead to any sale at that price. From this the Board must clearly conclude that from 1976 - 1980 (inclusive) $175,000.00 was too high a value for the subject property. The 1980 sale price of $100,000.00 is the only real value of the subject property the Board has to compare with the value of the subject property arrived at by Mr. Hoeg when he valued the subject property by the "cost approach" method.

Is then that sale price, coupled with the evidence of no increase in value over that time (or at least no sales of this or any comparable property), the true standard of market value of the subject property at the time relevant to this appeal? The Board is tempted to say yes.

Yet there is 8 years time differential between the time of the purchase and the present and approximately 6 years difference from the date set by the Director for the valuation of the subject property. That is a considerble time differential between sale of the subject property and the date set by the Director for the valuation of the subject property. Sale prices as a guide to valuation of property notoriously become less useful as they age. Although there is no evidence before the Board, it is also notorious that in the years 1981 - 1986 there was a rate of inflation prevalent in Canada (which includes the subject property) which had the tendency to devalue the buying power of the Canadian dollar. If the value of a property remained constant from 1980 to 1986 and that value were to be expressed in dollars current to the time of expression, the 1986 figure in dollars would be larger in 1986 than it was in 1980 by an amount equal to the rate of inflation applicable to those years and compounded annually (the way the rate of inflation is often calculated and expressed).

The Board did not understand the Appellant to say that the value of the subject property depreciated over the relevant years, merely that it did not increase. Thus it would seem to the Board that, assuming the appropriate market value of the subject property was set at $100,000.00 in 1980, (and remained constant in value) that value, expressed in 1986 dollars would be numerically greater than the 1980 value of $100,000.00 expressed in 1980 dollars.

The Board has also some doubts as to the accuracy of the 1980 sale price of the subject property as reflecting the market as between a willing buyer and a willing seller. There is little doubt that the purchaser is the type of "willing purchaser" who is 1/2 of a freely negotiated sale of the kind contemplated necessary to make a transaction a free market sale. The vendor may be different. The vendor was, in essence, a government agency. Such agencies may have agendae much different than the agendae that "willing sellers" would have when making up their 1/2 of the transaction reflecting the market as between a willing buyer and a willing seller. Government agencies may be looking to unemployment in a depressed area and be willing to sacrifice top price to ensure that some jobs may come on stream "now" rather than 6 months or a year down the stream. Government agencies can remove surplus land that has been too long in inventory at a "sacrifice" price and make up the difference from the taxpayer, which alternative is not so easily available to the non-governmental seller in the same position. In short, the Board has some doubt that the 1980 sale price quoted represents accurately the appropriate market value of the subject property even at the time it was made.

The Appellant continues to operate its business in the subject property, has not adduced its financial statements to prove that it is paying an uneconomic rent for the subject property, even though it carried on its business for about 8 years. If the value of the subject property generated an uneconomic rent cost to the Appellant, the Board would have thought that the Appellant might have advanced that fact to support its appeal.

In the mind of the Board, the above shows that the

Appellant's approach to the valuation of its property by the Market Data Approach, while charming in its simplicity, may not necessarily be correct. The Appellant's source of the evidence in this appeal has demonstrated no particular expertise in the valuation of real estate in Springhill and no experience in valuation for assessment purposes. On the evidence, the Appellant's witness has a rather direct pecuniary interest in reducing the property taxes of the Appellant. The Director's main witness as to value, Mr. Hoeg, has a much less direct pecuniary interest than Mr. Benjamin in the outcome of the appeal: the Director's "fee appraisal" expert witness (Mr. Hardy) does not go into the value in this appeal but merely testifies as to the correct technique" as to how depreciation should be applied to replacement cost in the Cost Approach to Value." Mr. Hardy's direct financial interest in this appeal is, on account of his profession, known and "up front" and depends little on the outcome of this appeal.

The Income Approach to valuation has been excluded by both parties to this appeal and the Board, on the evidence, can only concur that this is a correct exclusion.

After thoroughly reviewing all the pros and cons as set out above, the Board, with a fair degree of hesitation, finds that it cannot accept the Market Data Approach to valuation (advocated by the Appellant) in this appeal. The Board accepts the uncontradicted evidence of the Appellant that the value of the subject property did not reduce over the time the Appellant owned it. In that case, inflation would have numerically increased the number of dollars required to represent the constant value (expressed at the purchase in 1980 dollars) which would have to be expressed in 1986 dollars. Thus the result advocated by the Appellant had to be wrong. In effect, as claimed by counsel for the Director and by Mr. Hoeg, the sale used by the Appellant was just too old. As mentioned before, since the vendor was a governmental agency who had held the property for some time there is at least an aura of "distress sale" surrounding the disposition of the subject property in 1980.

Having discarded the Income Approach and the pure Market Data Approach to valuation of the subject property, the only conventional approach to valuation (as advocated by Mr. Hoeg) left to the Board in this appeal to help it to determine the market value of the subject property for assessment purposes is the technique sometimes called the Cost Approach to Value.

Mr. Benjamin, as an addendum, in his submission (Exhibit W-8) attempted to use a Cost Approach to Value and arrived at a value for the subject property of some $85,000.00. This value was lower than the $100,000.00 to $110,000.00 value that Mr. Benjamin was seriously advocating to the Board based on his ideas of the actual market value of the subject property. This value is clearly wrong in that it is lower than the 1980 sale price (and value) of $100,000.00 which the Board has already said must have grown numerically greater between 1980 and 1986.

In addition, Mr. Benjamin demonstrated no particular expertise, or previous experience, in applying the somewhat technical and complex Cost Approach to Value techniques in valuing property at its market value for assessment purposes. Both Mr. Hoeg and Mr. Hardy have had much experience in this field. When the opinions as to the technique to be used by a person seeking to value a property by the Cost Approach to Value of Mr. Hardy and Mr. Hoeg differ from the opinion of Mr. Benjamin as to the technique to be used (and as used in this appeal) by a person seeking to value a property by the Cost Approach to Value, the Board prefers the opinions of Mr. Hoeg and Mr. Hardy to the opinions of Mr. Benjamin.

In an ordinary appeal, the final resolution of the value (given the findings of the Board to this point of the decision) should be simple and should follow the line adopted by Mr. Hoeg in arriving at his value of $131,000.00 which is his resolution of the disputed portion of the assessment of the subject property.

Mr. Hoeg arrived at the value ($21,600.00) of the land component of the cost of the subject property by applying the market data approach and searching for comparable sales of vacant land in the Town. Mr. Benjamin felt there were not enough sales of vacant land to justify even this component of cost, saying the comparables selected were too dissimilar to the subject property and that some of the sales used were not true sales of vacant land appropriate to serve as comparables. Mr. Hoeg expressed himself as not completely satisfied with the direct relevance of all the comparables selected so he discounted the per acre price he had calculated from the prices of the comparables he had selected so that the price per acre he used for the subject land would be, if anything, low. The Board agrees with the opinion of Mr. Hoeg as to the value ($21,600.00) of the land component of the cost of the subject property.

Mr. Hoeg selected a depreciated building value of $109,600.00 to add to the land cost of $21,600.00 (totalling $131,200.00) which he rounded to $131,000.00 and delivered the opinion that this was the market value of the subject property for assessment purposes. He said he derived this technique or method by following what he called "(Nowland [sic] v. Director of Assessment)" method of depreciation.

The calculations he made using this technique are set out in Schedule "B" to this decision and appear on P. 28-A of Exhibit W-6.

The Board had a previous assessment appeal decision NOWLAN v. DIRECTOR OF ASSESSMENT (1986) Vol. 5A M.B.D. 185[1].

Schedule "C" of this decision is a summary of the calculations made by Mr. Hoeg showing the market value of the subject property for assessment purposes to be $492,302.00. He said he derived this market value for the subject property by utilizing a technique or method of calculation used by the Board in calculating the market value by the Depreciated Cost Approach in a Board decision NOVA SCOTIA ICE CO. LTD. v. DIRECTOR OF

ASSESSMENT (1983) 2 M.B.D. 225[2]. Mr. Hoeg did not follow the technique of calculation he said was used in NOVA SCOTIA ICE[2] in arriving at the market value of the subject property herein.

Schedule "D" of this decision is a summary of the calculations made by Mr. Hoeg showing the market value of the subject property for assessment purposes to be $111,400.00. He said he derived this market value for the subject property by utilizing a technique or method of calculation used by the Board in calculating the market value by the Depreciated Cost Approach in a Board decision NATIONAL SEA PRODUCTS LIMITED v. DIRECTOR OF ASSESSMENT (1986) Vol. 5-A M.B.D. 129[3]. Mr. Hoeg did not claim to follow the technique of calculation he said was used in NATIONAL SEA[3] in arriving at the market value of the subject property herein but one may note that the $111,400.00 value for the subject property so arrived at, according to Mr. Hoeg, is only $1,800 higher than the value Mr. Hoeg says is the correct value for the subject property for assessment purposes [less than a 2% error]. NATIONAL SEA[3], as far as the Board knows, never succeeded in perfecting its appeal status although a "Notice of Appeal" was received by the Board April 25, 1986.

Mr. Duplak, for the Director, concedes that, in result, valuations in this case arrived at by applying NATIONAL SEA[3] guidelines or by applying NOWLAN[1] [which guidelines Mr. Hoeg says are correct] are so little different that it may not be essential to decide for this appeal which case's guidelines should be applied. He contends, however, that if the valuation guidelines of NOVA SCOTIA ICE$_2$ are applied to the facts of this case the result is wrong to an unacceptable degree. Mr. Duplak goes on further to argue that the Board should review those decisions in coming to its valuation in the present appeal, decide which of its previous decisions to follow, and therefore give guidance to the assessors of this Province who in the future may have to use the Depreciated Cost Approach in the course of their duties.

The Board notes in passing that the difference in results arrived at by applying Mr. Duplak's interpretation of the valuation formula he derived from NATIONAL SEA$_3$ and the formula he derived from NOWLAN$_1$ to the "givens" of this case seems to be at which point in the calculation scheme in each formula one inserts the figure of $62,924.00 for "physically curable depreciation".

Mr. Duplak's arguments are, in logic, based on the premises that both he and Mr Hoeg correctly interpreted the meaning of the Board's three previous decisions cited above and that the three cases cited are sufficiently similar to the case under appeal to have a determinative effect on the outcome of the present appeal. If that premise is accepted then, as the Board understands Mr. Duplak's arguments, Mr. Duplak would have the Board rationalize the difference of result to be obtained by applying NOWLAN$_1$ - NATIONAL SEA$_3$ guidelines to the facts of the present appeal and the result to be obtained by applying NOVA SCOTIA ICE$_2$ guidelines to the same facts. He is then advocating, in effect, the Board accept NOWLAN$_1$ - NATIONAL SEA$_3$

and "reject" NOVA SCOTIA ICE$_2$. Mr. Duplak argues that the Board conduct this rationalizing process so that its decision in this case can resolve the conflict he discerns in these apparently conflicting line of cases. He says this conflict is causing much difficulty to assessors who have to value commercial property for assessment purposes using the Depreciated Cost Approach.

Such arguments raise the initial question of what consideration the previous decisions of the Board should be given when the Board is making a current decision: shortly stated, in more direct terms, how much - if at all - should the Board be bound by its prior decisions?

The Municipal Board Act, itself, deals with this problem to some extent. It clearly has the power to determine the issues properly before it including many assessment matters. See certain sections of that Act:

> "4 The Board shall
>
> a) perform such duties as are conferred upon it by this Act...the Assessment Act...
>
> 32 (1) The Board has the exclusive jurisdiction in all cases in respect of all matters in which jurisdiction is conferred on it.
>
> (2) The Board as to all matters within its jurisdiction under this Act, has authority to hear and determine all questions of law or of fact."

Having established the Board's duty to determine certain assessment matters, the Municipal Board Act requires the Board to keep records of its proceedings (Section 39) and to make any of its decisions in writing with reasons:

> "42 (1) A decision of the Board shall be in writing and shall set forth reasons for the decision.
>
> 44 (1) The Board shall publish the decisions of the Board annually."

The Board as an invariable practice reduces all its public decisions on inter-partes matters accorded to its jurisdiction to reasoned decisions in writing in conformity with these sections of the Municipal Board Act. The Board does publish its decisions annually (after first circulating the decisions to subscribers as the decisions are made) and persons subscribe to the purchase of the decisions thus published. There must be a purpose, or purposes, for this statutorily prescribed decision writing process to be imposed upon the Board and for the published decisions to be of interest to others (not necessarily parties to any of the published decisions) to encourage them to subscribe for the published bound decisions.

The Board in some of its own previous decisions has contemplated the effect of previous decisions of the Board on current Board decision making.

THREE STAR DEVELOPMENTS LIMITED v. THE MUNICIPALITY OF THE COUNTY OF HALIFAX (1986) 5B M.B.D. 290_4 (leave to appeal sought, appeal abandoned before hearing) is a planning decision of the Board in which it was asked by counsel to consider the application of Section 15 The Canadian Charter of Rights and Freedoms to the appeal before the Board. There existed a previous decision of the Board, JOHN J. MacDONALD v. TOWN OF WESTVILLE (1985) 4-B M.B.D. 32_5, which apparently held that the

Board had no jurisdiction to apply Section 15 of The Charter. The Board in THREE STAR[4] was asked to apply The Charter. In order to decide whether it had jurisdiction to apply The Charter in THREE STAR[4], the Board felt it had to deal with its previous decision in MacDONALD[5] which it did starting at p. 350 of THREE STAR[4].

> "The Board in...MacDonald... dealt with Charter issues with a different conclusion than the Ontario cases cited.
>
> If MacDonald...facts required the Board to arrive at the rulings it made in that case then this Board would have difficulty in following the result of the Ontario decisions...[p. 351] the Board's findings could stand on other grounds as no constitutional rights were properly before it. Thus the blanket statement of the Board's inability, because of its status as an inferior tribunal, to interpret its legislation in light of the constitution, while of great persuasive value, is dicta [obiter dicta?] and this Board does not feel the imperative to be bound by that statement in light of other precedents canvassed by the Board in this appeal."

The Board, according to this decision, gives weight to previous Board decisions but is not necessarily bound by them.

OAKDENE ESTATES LIMITED v. THE MUNICIPALITY OF THE COUNTY OF HALIFAX [often referred to as "Oakdene 2"] (1986) 5-B M.B.D. 571[6] is another decision of the Board relating to planning matters in which the Board had occasion to deal with a previous Board decision OAKDENE ESTATES LIMITED v. MUNICIPALITY OF THE COUNTY OF HALIFAX [now usually referred to as "Oakdene 1"] (1985) 4-B M.B.D.[7]. The headnote of OAKDENE 2[6] says:

> "On the merits, this application follows from the Board's previous decision in OAKDENE 1 involving the same developer and lands but less intense land use."

The results in OAKDENE 1 prohibited the planned development; the results in OAKDENE 2 allowed the planned development.

In the text of OAKDENE 2[6] the Board comments on the previous decision in these words commencing at p. 581:

> "The decision in OAKDENE 1 fully sets out the technique to be used by the Board to determine the intent of the M.P.S. The lands and the developer are essentially the same in OAKDENE 1 appeal and in this appeal. The two appeals are quite close in time. The Municipality's planner, the same person in each case, recommended both rezonings. In each case the developer appealed. The main difference seems to be in the density allowed by the two rezonings proposed, R-4 in OAKDENE 1 and R-2 in this current appeal...
>
> The Board will not repeat the exhaustive reasoning which can be found in OAKDENE 1, but it agrees with the reasoning therein contained."

In this case, although the Board arrived at opposite results based on a difference in facts of the two appeals, the Board in the second case followed the "reasoning" outlined in the first of the two appeals.

The Board was asked in JOHN DALTON v. THE CITY OF SYDNEY NSMB-567-87-P (unreported) to "overrule", "disregard", "distinguish", or otherwise not follow a previous Board decision DAVID RANNI v. CITY OF SYDNEY NSMB-551-86-P (unreported)[9]. Starting at p. 13 of the filed decision in DALTON[8], the issue of authority of the Board's previous decisions over the Board's decision in progress is stated and dealt with in these words:

> "Mr. Whalley most strongly advocated that a previous Board decision...RANNI...made by a one person Board consisting of the then Chairman Robert H.N. Blois, Q.C. was wrongly decided and tht this Board should decide this appeal disregarding the RANNI decision. Mr. Whalley is correct when he states that this Board is not bound by its own previous decisions. The

> statutory direction to file written decisions (see s. 42(1) of the Municipal Board Act) must be, at least, some indication that the Board, as well as others, should have a knowledge of those previous decisions and should thus be protected against making current decisions in ignorance of the content of previous decisions on the same or similar topics.
>
> In that respect, the Board (however it may be constituted in a given case) ought to aim to be informed of previous board decisions always giving them effect to the extent they are applicable to the circumstances at hand and following them when possible. In order to deviate from past decisions of the board with facts similar to the case at hand, the current board ought to see that the previous board was in error in some manner that can logically and clearly be put to paper.
>
> Some degree of consistency, and thus certainty, in the application of the statutes the Board has the duty to apply, must be the goal.
>
> Mr. Whalley is strongly of the opinion that the Blois Board in RANNI made the type of error which would allow the Board here to disregard that decision... Mr. Whalley has not persuaded the Board that the Board has any grounds for desregarding [sic should be "disregarding"] the decision in RANNI. ...The Board can only repeat what Chairman Blois said in RANNI:..."

Of the Board's decisions noted above, the Board feels that DALTON[8] affords it the most assistance in resolving the issues raised by Mr. Hoeg and Mr. Duplak.

Learned writers have dealt with the issue of Board's respect for its own prior decisions. Recent Developments in Nova Scotian Administrative Law by David J. Mullen (1978) 4 Dal. Law Journal 467[10] at p. 531 under the Chapter heading "III Judicial Review in Nova Scotia - Substantive Grounds (a) review for inconsistency" seems to touch somewhat on the issues Mr. Duplak has put before the Board in this appeal. At p. 532 Professor Mullen sets up his thesis in the following words:

"However, the more interesting point is to speculate upon what the court would or should have done if it did find inconsistency between the two decisions. ... [p. 533] one indication of manifest unreasonableness may arguably be inexplicable or unexplained inconsistency between cases with identical facts. Of course, whether the difference is inexplicable raises great problems. For example, is a statement to the effect that the tribunal has changed its policy since deciding the previous case an explanation? Furthermore should inconsistency alone be a basis for judicial review? Rather should the reviewing court generally not have to go further and consider whether, in the light of the inconsistency, it is the first decision or the one under review which is unreasonable. Persons acting reasonably frequently differ in solutions they adopt to problems. Difference in itself does not mean that one result is necessarily unreasonable and the other reasonable.

In this light, it is interesting to consider a recent English Court of Appeal decision HTV LTD. v. PRICE COMMISSION...in which inconsistency was one of the grounds of judicial review...The case involved the Price Commission acting contrary to its past practice... in trying to justify a price increase under price control. ...Lord Denning M.R...

> "It is my opinion, the duty of the Price Commission... primarily...to interpret and apply the code, nevertheless if they regularly interpret the words of the code in a particular sense - and regularly apply the code [p. 534] in a particular way - they should continue to interpret it and apply it in the same way thereafter unless there is good cause for departing from it."

...Goff L.J., however, was, if anything, stronger than Lord Denning M.R.:

> "It is of the utmost importance that statutory tribunals should be consistent and this is a very clear instance on which the facts call for the exercise of [the courts] supervisory jurisdiction."

...it is an appeal to a widely held notion of justice that, all other considerations being equal, like cases deserve to be treated alike...unexplained inconsistency is always unreasonable ...[p. 536] precedents supporting review for inconsistency ...are not strong and must realistically be seen as an outgrowth of the

> theory of the duty to act fairly developed originally...as a procedural doctrine to circumvent some of the difficulties in the traditional law governing the application of the rules of natural justice.
>
> ...[p. 537] The creation of administrative tribunals is frequently justified on the basis that they will be able to perform tasks unhampered by the comparatively rigid rules of precedent that characterize the ordinary courts. Indeed, the common law has developed rules of judicial review that may be seen as designed to safeguard administrative tribunals from court-like tendencies with respect to precedents...To then suggest to tribunals that they will be subject to judicial review if they are inconsistent may be at odds with this and push them in the direction of being concerned with adhering to past practice in all cases at the expense of other considerations that we think are desirable.
>
> Of course, the value that like cases be treated alike is one that has a considerable claim to recognition even in a broadly discretionary regime...[p. 538] If inconsistency is to become a separate ground of judicial review I suggest that it only be available in the most flagrant case and that the reviewing court be prepared to accept very readily the explanations of the tribunal for the inconsistency in issue. ..."

Professor Mullen seems to think that the persuasive effect of past tribunal decisions on present tribunal deliberations raises issues of some complexity.

The Board has to date, in considering the persuasive effect of past tribunal decisions on present tribunal deliberations, dealt with certain Board decisions and a learned article published in a law journal. There is case law on point in reported Canadian, English and American jurisdictions that the Board might also usefully peruse. Some of that case law follows.

RE CITY OF PORTAGE LA PRAIRIE v. INTER-CITY GAS

UTILITIES LTD. ET AL 12 D.L.R. (3d) 388[11], a decision of the Manitoba Court of Appeal, says this in its headnote:

> "Whether Board bound by its own prior interpretation...The Board...is not bound by the construction it itself may have placed upon the phrases in other proceedings directed to different issues."

Freedman J.A. (speaking for the unanimous court) starting at p. 397 had this to say concerning the issue put to this Board:

> "Nor do we see any need to depart from this conclusion by reason of something which the Board said or did in 1961, in completely different circumstances, having little or any relevance to the situation of the present time...Counsel now argues that this was a ruling by the Board on the meaning of "public interest" and that such ruling should be applied to and govern the present case.
>
> We do not agree. The 1961 ruling grew out of the situation that then faced the Board...The Board was rejecting a narrower concept of "public interest" and accepting-in the context of the particular dispute - a broader concept. That does not mean that it may not, in different [p.398] circumstances, enunciate a still broader concept of that term."

RE HOPEDALE DEVELOPMENTS LIMITED and TOWN OF HOPEDALE 47 D.L.R. (2d) 482[12], a decision of the Ontario Court of Appeal, says in its headnote:

> "Right of Board to enunciate general principles as guides in later cases - Improper to be limited thereby as against duty to decide case on merits...although it is permissible for...an administrative tribunal...to formulate general principles by which to be guided in subsequent cases it would be wrong for the board to fetter itself by those principles and either require every applicant to meet them or exclude other considerations which may arise in a particular case. Principles enunciated in preceding cases cannot be used restrictively so as to limit consideration of an application upon its merits."

McGillivray J.A., writing for the unanimous court, says the following which bears on the issues with which the Board is now wrestling, starting at p. 486:

> "the Board was thus required to exercise its independent judgment upon the merits of the Appellant's application...The issue accordingly, did the Board by announcing a policy by which it proposed to guide itself, and by stating that the application did not accord with that policy, then refuse to exercise its independent judgment in the matter before it.
>
> The right of an administrative tribunal to formulate general principles by which it is to be guided is undoubted and has been considered upon many occasions in the Courts, ...[quoting a text]
>
> > "It is obviously desirable that a tribunal should openly state any general principles by which it intends to be guided in the exercise of its discretion."...
>
> The tribunal...where it has announced considerations by which it is to be guided, and where it has original jurisdiction, must not fetter its hands and fail, because a guide has been declared, to give the fullest hearing and consideration to the whole of the problem before it...[p. 487] The hearing before the Board is a hearing de novo and must be conducted as such."

RE BOARD OF DIRECTORS OF LETHBRIDGE NORTHERN IRRIGATION DISTRICT and CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 70 38 D.L.R. (3d) 121[13] is the final Canadian case, reported in the conventional reports, that the Board wishes to advert to herein. The portion of its headnote the Board notes is:

> "[p. 122] Effect of prior decision of board of Industrial Relations-Board not bound to follow its own previous decisions."

At p. 125 of the decision, Milvain C.J.T.D. says:

> "In this instance the Board certainly "reversed its course". However, that of itself cannot be grounds for quashing its decision. I am sure the Board is not bound to follow its own previous conclusions as to the law. It may repent and recant."

MERCHANDISE TRANSPORT LTD. v. BRITISH TRANSPORT COMMISSION AND OTHERS [1962] 2 Q.B. 173[14], an English Court of Appeal decision, says, in part, in its headnote [starting at p. 174]:

> "Judicial Precedent-Transport Tribunal - Whether previous decisions binding...
>
> Although it is desirable that a series of reasoned judgments disclosing the principles on which the Transport Tribunal proceeds should be built up, the tribunal has a discretion, and should not therefore regard itself as bound by its own previous decisions nor make rules so as to prevent itself...from examining each case on its merits."
>
> Sellars L.J. at p. 186 says:
>
> "In my view it is desirable and no doubt inevitable that a body of guiding authority should be built up as the various circumstances call for adjudication, but viewing this matter for the first time and recognizing that the whole field has not been traversed, the criticism does not seem wholly unjustified. Where discretion lies it should not be hidebound by authority...
>
> Devlin L.J. [p. 193]...
>
> "...a tribunal must not pursue consistency at the expense of the merits of individual cases. If the discretion is to be narrowed, that must be done by statute; the tribunal has no power to give its decisions the force of statute."
>
> Dankworth L.J. [starting at p. 207]...
>
> "The tribunal...had rejected this contention four years ago in Reed's case...and that they saw no reason to modify what is said in that case...
>
> One feature of this jurisdiction, which the tribunal's reference to Reed's case...brings into notice, is that over the years since the tribunal's predecessor was founded, a system of case law has been built up in law reports which are now in the 31st volume. It is no doubt an advantage to traders and those who advise them to have records of this kind to show how applications are likely to be dealt with. No doubt it is also

> right that [p. 208] the tribunal should have regard to a consistent practice in dealing with applications for licenses. But in the exercise of a discretionary power of this kind, an applicant is entitled to have his application considered on its merits and in the circumstances of his particular case. If the tribunal makes a practice on relying on previous decisions in respect of previous decisions that have come before the tribunal, there is, in my opinion, danger that the discretion of the tribunal may not be applied in an unfettered and proper manner having regard to the merits of the particular case, and, of course having regard to the principles which are regarded as being incorporated in the provisions of the Act."

Professor Mullen mentioned the following English Court of Appeal decision in his article cited above. The Board attempted to get the original decision but was unable to do so. As the next best thing, the Dalhousie Law Library was able to come up with notes of HTV LTD. v. PRICE COMMISSION 120 The Solicitor's Journal 298[15]. These notes attribute the following relevant comments to the following judges:

> Lord Denning M.R. "said that in the past the commission had regularly treated the levy as properly to be included in "total costs" and it would be unjust for them now to assert that it should not be included."
>
> Goff, L.J. "It was of great importance that statutory tribunals should be consistent."

These snippets of rulings of such an illustrious court, and the allusions in Professor Mullen's article to this decision, tantalize the Board as to the true import of the decision HTV LTD.[15]. Without the full text available to it, the Board is reluctant to draw any legal conclusions from HTV LTD.[15].

A United States Court of Appeals, District of Columbia Circuit decision, GREATER BOSTON TELEVISION CORPORATION v. F.C.C. 444 F. 2d. 841[16] is the last foreign decision the Board read in preparing to write this decision. In its headnote it has the following statement:

> "although an agency's view of what is in the public interest may change, either with or without a change in circumstances, an agency changing its course of action must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, [at p. 852 that headnote is fully fleshed out in the decision of Leventhal, Circuit Judge] and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute."

Since this appeal has been held the issue of the Board following its prior decisions (or failing to follow them) has been raised as a ground of appeal raising a matter of law in THE TOWN OF BEDFORD v. ARMOYAN GROUP LIMITED S.C.A. 01908 (unreported)$_{17}$ which was an application for leave to appeal heard by MacDonald A.J., in appeal court chambers. From that decision one extracts:

> "[p.3] the position of the Applicant on these issues is that the Board previously ruled that only the policies of a Municipal Planning Strategy are to be looked at when attempting to [p. 4] determine the intent of the M.P.S....
>
> In its decision the Board did take into account certain statements in the M.P.S. which were not policies...
>
> [p. 7] With respect to his submission that the Board has previously determined that the intent of the M.P.S. was to be ascertained by looking only at its policies counsel for the Town...referred to the Board's decision in OAKDENE [actually OAKDENE 1$_{7}$ supra]...
>
> Counsel for the respondent referred to the later decision of the Board...SPINNEY [which said, in effect the whole of the M.P.S. was to be perused in determining its intent]...
>
> In view of the SPINNEY decision I do not think it can be said that the Board has restricted the ascertainment of the intent of the M.P.S. to a consideration only of

> its policies. Indeed I do not read OAKDENE as saying that it is policies and only policies that can be considered in determining such intent. Rather, although a consideration of the policies are obligatory they are not the sole matters that may be referred to in such determination. As Chairman Blois pointed out in SPINNEY the intent is to be ascertained by a perusal of the entire M.P.S. In my opinion even if it could be said that the Board did deviate in this case from a principle laid down in earlier cases such does not in my mind amount to an error in law or of jurisdiction." [emphasis that of the Board].

Mr. Justice Macdonald then went on to cite RE HOPEDALE[12] and LETHBRIDGE[13] as suitable authorities for his conclusion.

Having canvassed the above authorities for such guidance as they might provide to the Board in arriving at a correct conclusion to this appeal, the Board then must look to its duty to determine the central issue in this appeal, namely the setting of the market value of the subject property for assessment purposes pursuant to Section 38 of the Assessment Act.

Mr. Duplak would have the Board look to the decisions from the Board mentioned in Exhibit W-6 and repudiate the valuation approach contained in certain of them while adopting the approach contained in another. The Board understands why such a sorting out of apparently conflicting decisions by the Board might be of interest to the Director. The Board has no problem in this case in selecting the valuation approach in one of the cases as a "precedent" for the discharge of its duty to decide this appeal and, in the fullness of time, will proceed to do so.

The Board does, however, have a great problem in repudiating the valuation approach apparently contained in prior Board cases which (according to Mr. Duplak) do not agree with the approach to be selected by the Board in this case. In no statute the Board has seen does this Board have a duty, or even a power, to review prior Board decisions as an assistance to the general assessment process. The Board must consider relevant previous Board decisions in the context of deciding the appeal currently before it.

In reviewing the above cases which were alluded to by Mr. Hoeg in his report Exhibit W-6 namely NOWLAN$_1$, NOVA SCOTIA ICE$_2$ and NATIONAL SEA$_3$ the Board studied each one carefully to see if any of them had adopted, as a matter of law and having been specifically asked to do so, any particular method of valuation in the context of the Depreciation Cost Approach using a specific order for the deductions of depreciation claims on a diminishing balance of reproduction costs. None of these cases listed explicitly in their text a conscious choice of order of the application of depreciation to the cost of reproduction, diminishing balance of depreciation or no, or even what were the proper categories of depreciation and whether the categories mentioned were an exhaustive list. Mr. Duplak, in his appeal, is asking the Board to select an appropriate depreciation application technique using the Depreciated Cost Approach and explicitly "denounce" the other approaches apparently used in the other Board cases. All the three cases make no such explicit selection thus they provide no precedent that this Board should now make such explicit selections, both positive and negative.

NOVA SCOTIA ICE$_2$ (the case that Mr. Duplak urges the Board to treat with most disdain), on a careful reading seems authority for the following statements dealing with the issues argued before the Board:

> "The opening paragraph of the article by Robert J. Flanagan, CAE entitled Industrial Property, Crucial Points in the Valuation Process...reads as follows:
>
> [p. 252] Among the various classes of real property for which the assessor or appraiser is required to establish value, the appraisal of industrial property is probably the most controversial resulting in many cases in significant divergencies in value estimation. Real estate appraisal by its very nature is questionable, controversial, and debatable, principally because it involves not only mechanical mathematical procedures that must stand the test of reasonableness, but also subjective judgment about the concepts of value, highest and best use, valuation principles and procedures, and analysis of market phenomena.
>
> The subject assessment is one of those assessments commented upon by Mr. Flanagan."

The Board finds no objection with finding that in this appeal "the subject assessment is one of those assessments commented upon by Mr. Flanagan." The Board feels that, in this excerpt, NOVA SCOTIA ICE$_2$ decided that assessment is an art as well as a science. The Board is well aware that the Director and his assessors have a massive annual duty under the "Assessment Act" to provide a value for assessment purposes for every property in Nova Scotia, before a strict deadline, and that this process would be assisted, from the Director's point of view, if the more scientific aspect of valuation ("mechanical mathematical procedures that must stand the test of reasonableness") were emphasized and art aspect of valuation ("subjective judgment about the concepts") were deemphasized. If this were to occur his job would be much easier, but it is likely, in the view of the Board, the values so arrived at would be less likely to be the valuation called for by Section 38 of the Assessment Act.

If Mr. Duplak's argument is correct this Board, in making its decision herein, will be selecting the one correct approach to valuing a property by the Depreciated Cost Approach in that this decision will decide once and for all:

1. Whether or not the diminishing balance technique to depreciation should be applied to valuation for assessment purposes when using the Depreciated Cost Approach?

2. If the diminishing balance technique is the correct technique to use in such circumstances, in what order should the various amounts of depreciation be applied to the Cost of Reproduction New.

In NOVA SCOTIA ICE$_2$ at p. 255 the Board finds these statements of principle:

> "Another concern in using the profit test approach to establish a reliable rental income for the property is that net rental income is greatly dependent upon the level of sales which the business generates and the level of sales for the business may vary greatly from year to year causing wide variations in yearly property rental values. The variations in sales from year to year may not be a function of the productivity of the real estate but rather the temporary gain or loss of business for reasons other than real estate productivity. In the opinion of the Board, it is difficult to allot the income of the business among real estate productivity, business management and good will... The Appellant has not shown that the profit

> test has been utilized in Canada for assessing special purpose industrial property. The appellant has also not proven to the satisfaction of the Board the general acceptance by appraisers of the views presented in the textbook. Also the Appellant has not proven that the profit test has been utilized and approved by any administrative tribunal or judicial authority in Canada in determining market value of property for assessment purposes...[p. 256]
>
> The Board therefore does not accept the income methods suggested by the Appellant because the Board is uncertain about the accuracy or reliability of the rental value of the property..."

Much the same arguments were made by Mr. Hardy in this appeal. Mr. Duplak can hardly be seen to be contesting this principle enunciated in NOVA SCOTIA ICE$_2$ because both he and his expert witness are advocating this particular principle should be applied in this appeal. Further on p. 256 the Board decides:

> "The Board accepts the depreciated replacement cost approach to estimate the market value of the subject property [p. 257] for assessment purposes. The depreciated replacement cost approach has been approved by the Supreme Court of Canada and is an acceptable method to determine the market value of property for assessment purposes in certain cases."

At Mr. Duplak's behest, and after some hesitation on the part of the Board, the Depreciated Replacement Cost Approach has been deemed suitable for use by this Board deciding this appeal using this ratio contained in NOVA SCOTIA ICE$_2$. Again Mr. Duplak cannot be heard to disagree, in these circumstances, with this particular ratio contained in NOVA SCOTIA ICE$_2$.

For the rest of the decision in NOVA SCOTIA ICE$_2$, the Board went on to a detailed summary of the evidence of Mr. Farrell (chief valuation witness for the Director) and of Mr. Hardy (on that occasion a witness for the taxpayer Appellant) selecting, with reasons, certain of the valuations (or valuation arguments of each) and arriving at a valuation of the ice making plant then in question. Nowhere in the detailed decision of NOVA SCOTIA ICE $_2$ does it appear that the diminishing balance technique of applying depreciation was specifically put to the Board for decision. Nowhere does it show that it was specifically argued before the Board that the various categories of depreciation had to be applied to the Cost of Reproduction New in any set order, and if either proposition was advanced to that Board, the Board did not make any express rulings on either of those two points that are now so forcefully argued by Mr. Duplak.

One might infer, as has been done by Mr. Duplak, that the depreciating balance technique was not applied by the Board in its calculation of market value for assessment purposes in NOVA SCOTIA ICE$_2$. From that decision one might also infer that the method of applying depreciation (which will now be identified by the term "grossing of depreciation technique") apparently used by the Board in NOVA SCOTIA ICE$_2$ was a technique then advocated by the Director and adopted by the Board without much argument by the Appellant and without having the Board direct its mind specifically to the issues now raised but which were not then apparently of much concern to the parties in NOVA SCOTIA ICE $_2$.

There is no indication on the face of the decision that the valuation techniques used by the Board in NOVA SCOTIA ICE $_2$ were inappropriate to decide the proper valuation of the property to be valued in that appeal. In the view of the Board, NOVA

SCOTIA ICE$_2$ is a case in which the Board apparently did not use a diminishing balance technique in applying depreciation to a Cost of Reproduction New when using the Depreciated Cost Approach to arrive at the market value of the property there concerned for assessment purposes. It makes no ruling that that approach is the only proper approach in such circumstances, but only the implied ruling that in those circumstances the "grossing of depreciation technique" was appropriate. Had the Director argued or even indicated that this was an inappropriate technique in the then prevailing circumstances, perhaps Mr. Duplak could have forced the Board to "recant or repent" the ruling that the Board had made apparently supporting the "grossing of depreciation technique". The Board in NOVA SCOTIA ICE$_2$ made a selection, conscious or otherwise one cannot now tell, of a certain valuation technique. It did not make any final selection of an appropriate technique to be used in all other circumstances when the Depreciated Cost Approach is to be applied in valuing property for assessment purposes. In such a case, this Board, in applying the Depreciated Cost Approach to determine the value of the subject property for assessment purposes may look to the techniques used in NOVA SCOTIA ICE$_2$ as well as to other techniques brought before it in evidence in order to use whichever test is appropriate to the facts before it and which allow the Board to perform its duty under section 38 of the Assessment Act which is to determine the market value of that property for assessment purposes. The appropriate technique to be used by the Board in the art/science of arriving at a market value may vary from case to case depending on the evidence before it.

Mr. Hoeg says that the subject property has a positive value for assessment purposes. Mr. Benjamin, the only witness for the other side agrees (although not as to quantum): Mr. Hardy says that the use of the property shows that the subject property must have a positive value, although he has formulated no opinion as to the quantum of that value. Thus all the evidence before the Board shows that the subject property must have a positive value. If one applies the "grossing of depreciation technique" attributed to NOVA SCOTIA ICE$_2$ to the facts of this case the result obtained is a negative value. Since all parties agree that, in this case, the subject property has a positive value the application of the "grossing of depreciation technique" attributed to NOVA SCOTIA ICE$_2$ to the facts of this case (which would result in a negative value) is clearly not an appropriate technique in this appeal to assist the Board to arrive at the correct market value of the subject property for assessment purposes.

It is arguable that in certain circumstances a property may have a negative market value. Our major North American cities have deserted housing areas abandoned by their owners as having no value to them or to others. Any property occupied by a building damaged by fire or war where the building is economically unusable as it stands and where the value of the land cleared is less than the cost of removing the building remnants would have a negative market value. The "grossing of depreciation technique" attributed to NOVA SCOTIA ICE[2] may sometimes be an appropriate technique. When its application arrives at a negative valuation in respect to a certain property one should query its application when valuing that certain property for the purposes of the Assessment Act.

The Board, in this appeal, does not have to deal with whether or not, for assessment purposes, it is possible as a matter of law to arrive at negative value by the "grossing of depreciation technique" (or by any other technique) and, consequently will not do so.

Likewise the Board has reviewed the NATIONAL SEA[3] decision, notes again the small discrepancy as to value with the results advocated on behalf of the Director herein, and, for the same type of reasoning with which it dealt with NOVA SCOTIA ICE[2] says that the techniques of applying depreciation in a certain order in the facts of NATIONAL SEA[3] may well have been appropriate as techniques in that case but are not necessarily appropriate as techniques in the facts of the present appeal.

NATIONAL SEA[3], at p. 162 is authority for the following:

> "It is the view of the Board that the determination of the proper rates for depreciation and obsolescence is subjective and is not the result of the application of some mathematical formula. Other things being equal, the more experienced and qualified assessor or appraiser is more likely to make a better determination than the assessor or appraiser who is less experienced and less qualified."

Mr. Duplak, in this appeal, has adduced evidence from the more qualified and experienced "assessors or appraisers". They have used, with a thought out and consistent approach to the valuation of the subject property (the determination of the market value of which is admittedly of some difficulty), an approach to reach a reasoned market value which the expert assessor is able to adopt as representing his opinion based on his superior experience and qualifications.

The Board should think that Mr. Duplak would, in this case, at least, find no fault with the proposition just cited from NATIONAL SEA$_3$.

At p. 176 of NATIONAL SEA$_3$ the Board finds the following guidance:

> "Undoubtedly, the determination of a proper assessment [p. 177] for the subject plant and equipment with the provisions of Section 38 of the Assessment Act is not an easy task for either the assessor or for the appraiser."
>
> To which the Board can only say: "Amen!", and at p. 178:
>
> "...the Board is of the opinion that in this particular case these methods are inappropriate but that whether one or both might be appropriate in a different fact situation. [emphasis that of the Board]...
>
> This selection process is a matter of subjectivity and the Board can appreciate the views of the assessor and the appraiser in expressing quite different views."

This proposition is useful when one tries to understand how two opposing truthful expert witnesses, when expressing their honest opinions as to value, may differ so considerably.

The Board then notes, that in NATIONAL SEA$_3$, the Board went on to dispose of certain valuation problems which, while complex, have no real relevance to the present appeal. Again the Board in NATIONAL SEA3 does not set down the technique it used in ranking various classes of depreciation to arrive at its valuation as being the only suitable method of ranking of such classes of depreciation. From reading the decision in NATIONAL SEA3 the Board doubts that the ranking of depreciation classes was ever brought specifically to the Board's attention as a pressing issue requiring reasoned determination rather than tacit acceptance. The Board therefore is unable to accept NATIONAL SEA3 as an authority of a special ranking of depreciation to be applied in all cases in which the market value for assessment purposes of a property is determined by the Depreciation Cost Approach. The Board accepts the technique was an appropriate technique for the problem to be resolved in NATIONAL SEA3. It may not be the appropriate technique to be applied to arrive at value in this appeal.

Not feeling itself bound necessarily to follow the techniques of depreciation calculation apparently used in NATIONAL SEA3, and having decided that the techniques of depreciation calculation found in NOVA SCOTIA ICE2 have no application in the present appeal, the Board has the task of using the Depreciated Cost Approach to arrive at the market value of the subject property.

In using that approach, the Board must resolve which technique advanced in evidence it should follow. In this case, its task is made easier by the clear evidence of Mr. Hoeg who expressed, based on his experience and qualifications, a clear preference to apply a diminishing balance technique in applying the various classes of depreciation to the cost of reproduction of the building on the subject property. Mr. Hardy, concurred in by this appeal by Mr. Hoeg, gave an order of applying the depreciation classes which Mr. Hoeg adopted and which the Board can adopt as being appropriate on the facts of this appeal.

The Board sees no further need to comment on the effect of the decisions of NOVA SCOTIA ICE$_2$, NATIONAL SEA$_3$ or NOWLAN$_1$ in this appeal or to select the one (in this case, according to Mr. Hoeg, NOWLAN$_1$) to strike down the others. The Board feels that it can decide this appeal on the positive evidence of value adduced before it without criticizing the techniques used by the Board, otherwise constituted, in other appeals based on other facts.

The Board in this case had the two issues listed above carefully brought to its attention. The Board is satisfied in any event that, on the evidence adduced before it, it accepts the valuation arrived at by Mr. Hoeg using the techniques he did, namely the Depreciated Cost Approach during the use of which approach he applied various categories of depreciation against the reproduction cost of the building on the subject property on a diminishing balance basis in an order of categories of depreciation he selected as appropriate, which order and appropriateness was supported by the expert testimony of Mr.

Hardy.

If that decision is, in law, incompatible with other techniques set forth in NOVA SCOTIA ICE[2], and/or NATIONAL SEA[3] (which the Board does not for one minute believe) and those decisions are "wrong" and should be "struck down", the Board doubts that in the circumstances as set out above it is the duty of the Board to declare those decision(s) "wrong" and "strike them (it) down."

If Mr. Duplak for the Director is truly faced with irreconcilable Board rulings on matters of law perhaps his remedy would more appropriately be found at the Supreme Court, Appeal Division, level where there would seem in the view of the Board an appropriate forum for the reconciliation of conflicting statements of law by determinations of "rightness" and "wrongness" and of upholding the "right" law and of "striking down" the "wrong law". Their Lordships have both the power and the experience for such second guessing of the Board. Unless forced to by circumstances essential to deciding the case currently before it, the Board adopts the view that it has no mandate to "second guess" or "overrule" previous Board decisions: it wasn't there; the previous Board was.

For the above reasons the Board, adopting the view of the Director's evidence of value of the land and building, sets the market value for assessment purposes of the building on the subject property at $109,600.00 as of January 1, 1986 and adds to that value the value of the land of $21,600.00 for a final value for assessment purposes (rounded) of $131,000.00. To this figure is to be added in accounting for all the assessible property located on the subject land the amount of $40,000.00 being the agreed valuation of the equipment which is classified as assessible. This result is a reduction of $4,000.00 from the value arrived at in the Regional Assessment Appeal Court decision and thus the appeal is, in effect, allowed. Thus the commercial assessment for the subject property for the 1987 assessment year land, buildings and equipment is $171,000.00.

Both parties have suggested that the Board should deal with setting the business occupancy assessment to be assessed to the person occupying or using the subject property. The Director has probably computed the business occupancy assessment to the person occupying or using the subject property (at least he had a duty to do so under Section 7 of the Assessment Act) when the original assessment was set. Pursuant to Section 92A(1) of the Assessment Act he probably recomputed the business occupancy assessment to the person occupying or using the subject property by reference to the valuation set by the Regional Assessment Appeal Court as was his duty. There may be no such direct statutory duty for the Director to recompute the business occupancy assessment to the person occupying or using the subject property by reference to the valuation set by the Board when on appeal before the Board.

The Board has the same power to set a business occupancy assessment that the Regional Assessment Appeal Court has under Section 89(1)(a) of the Assessment Act to confirm, reduce or increase an occupancy assessment. In this case, because the value of commercial property giving rise to a business occupancy assessment has been reduced on appeal to this Board and because the Director may not have any power under Section 92A(1) of the Assessment Act to recompute, at this level of decision, the business occupancy assessment to the person occupying or using the subject property, the Board will exercise its power to calculate the business occupancy assessment to the Appellant (the person occupying or using the subject property) as follows:

To valuation of commercial property not excepted by S. 7(1)(b) of the Act	$131,000.00
To 50% of same pursuant to S. 7(1B)(2)(c) of the Act.	$ 65,500.00

The Board therefore sets the business occupancy assessment to the Appellant in this appeal computed in relation to the subject property in the amount of $65,500.00 for the year 1987.

The Appeal is allowed to the extent noted above. At the mutual request of both parties, to which the Board on all the facts of this case accedes, each party will bear his own costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 21st day of April, A.D., 1988.

RICHARD L. WELDON
Member.

NOVA SCOTIA MUNICIPAL BOARD.

SCHEDULE "A"

RE DEPRECIATED COST APPROACH

		BALANCE
REPRODUCTION COST	1,037,149.00	
LESS $\frac{25}{35}$ = 71.4% PHYSICAL	740,524.36	296,624.61
LESS. 50% ECONOMIC	148,312.31	148,312.30
LESS. PHYSICAL CURABLE	62,924.00	
	VALUE	85,388.30

THIS IS WITHOUT ALLOWING FOR FUNCTIONAL OBSOLESCENCE
YOUR CALCULATIONS 30%

LAND VALUE FEDERAL GOVERNMENT PROPERTY
7.3 ACRES 30,000
PRIME COMMERCIAL
BORDERED ON 3 SIDES
1 BY TRANS. CAN. CONNECTOR
2 BY JUNCTION ROAD
3 BY NORTH STREET

OUR LAND 15,000
NOW 21,600 NO JUSTIFICATION

SCHEDULE "B"

SUMMARY OF DEPRECIATED COST APPROACH (NOWLAND VS. DIRECTOR OF ASSESSMENT)

Reproduction Cost New		$1,037,149.
Less Functional Obsolescence 20% x 1,037,149.	= 207,429.	- 207,429.
		829,720.
Less Physical Curable	= 62,924.	- 62,924.
		766,796.
Less Physical (Long Life) 71.4% x 766,796.	= 547,492.	- 547,492.
		219,304.
Less Economic 50% x 219,304.	= 109,652.	- 109,652.
		109,652.
Depreciated Building Value	(rounded to)	109,600.

This method of depreciating improvements is the excepted procedure used in the Nowlan V. Director of Assessment decision of April 16, 1986.

This is the method I will use in this report to arrive at an estimate of Market Value.

SCHEDULE "C"

SUMMARY OF DEPRECIATED COST APPROACH
(NOVA SCOTIA ICE CASE V. NOVA SCOTIA DIRECTOR OF ASSESSMENT)

Reproduction Cost New		$1,037,149.
Less Physical Curable	= 62,924.	
Less Physical 71.4% 71.4% x 1,037,149.	= 740,524.	
Less Functional 20% .20 x 1,037,149.	= 207,429.	
Less Economic 50% .50 x 1,037,149.	= 518,574.	
Total Depreciation	= 1,519,451.	- 1,529,451.
Depreciated Building Value	Minus	— 492,302.

This method of depreciating improvements is the excepted procedure used in the Nova Scotia Ice Co. Ltd., and Crystal Indsutries Ltd. V. Director of Assessment decision of October 26, 1983.

SCHEDULE "D"

SUMMARY OF DEPRECIATED COST APPROACH
(NATIONAL SEA V. DIRECTOR ASSESSMENT)

Reproduction Cost New	$1,037,149.
Less Physical Curable = 62,294.	- 62,924.
62,924	$ 974,225.
Less Physical (Long Life) 71.4% x 974,225 = 695,596.	- 695,596.
	278,629.
Less Functional Obsolescence 20% x 278,629. = 55,725	- 55,725.
	222,904.
Less Economic 50% x 222,904. = 111,452.	- 111,452.
	111,452.
Depreciated Building Value	111,452.
or rounded to	= 111,400.

This method of depreciating improvements is the excepted procedure used in the National Sea Products v. Director of Assessment Decision of March 27, 1986.

SCHEDULE "E"

1 Nowlan v. Director of Assessment (1986) Vol 5-A M.B.D. 185

2 Nova Scotia Ice Co. Ltd. v. Director of Assessment(1983) 2 M.B.D. 225.

3 National Sea Products Limited v. Director of Assessment(1986) Vol. 5-A M.B.D. 129

4 Three Star developments Limited v. The Municipality of the County of Halifax (1986) 5-B M.B.D. 290

5 John J. MacDonald v. Town of Westville (1985) 4-B M.B.D. 32

6 Oakdene Estates Limited v. The Municipality of the County of Halifax[often referred to as "Oakdene 2"] (1986 5-B M.B.D. 571

7 Oakdene Estates Limited v. Municipality of the County of Halifax [now usually referrred to as "Oakdene 1" (1985) 4-B M.B.D. 1

8 John Dalton v. the City of Sydney NSMB-567-87-P (unreported)

9 David Ranni v. City of Sydney NSMB-551-86-P (unreported)

10 Recent developments in Nova Scotian Administrative Law by David J. Mullen (1978) 4 Dal. Law Journal 467

11 Re City of Portage la Prairie and Inter-City Gas Utilities Ltd. et al 12 D.L.R. (3d) 388

12 Re Hopedale Developments Limited and Town of Hopedale 47 D.L.R. (2d) 482

13 Re Board of Directors of Lethbridge Northern Irrigation District and Canadian union of Public Employees, Local 70 38 D.L.R. (3d) 121

14 Merchandise Transport Ltd. v. British Transport Commission and Others [1962] 2 Q.B. 173

15 HTV Ltd. v. Price Commission 120 The Solicitor's Journal 298

16 Greater Boston Television Corporation v. F.C.C. 444 F.2d 841

17 The Town of Bedford v. Armoyan Group Limited S.C.A. 01908 (unreported)

BRANCH DEVELOPMENTS LTD. v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION - NOTICE OF APPEAL - FAILURE TO SERVE IN ACCORDANCE WITH STATUTE - ASSESSMENT ACT, S.S. 100(1)

This is an appeal by B.D. Ltd. from a decision of the Lunenburg Regional Assessment Appeal Court which confirmed a Change of Use assessment. The President of B.D. Ltd. was hospitalized during appeal period. Notice of Appeal was filed with the Board and served on the Assessment Clerk after 30-day appeal period had elapsed. Neither the Director of Assessment nor the Regional Director of Assessment was served.

HELD: Appeal dismissed. No costs are awarded.

The Board has no power to extend time for serving a Notice of Appeal or filing a copy with the Board. The Limitation of Actions Act does not permit an extension of time for filing an appeal. The Board declined to award costs because the President of B.D. was under a handicap and because the matter was dealt with at a preliminary hearing and neither party had experienced direct out-of-pocket expenses.

NSMB-2-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **BRANCH DEVELOPMENTS LIMITED**, from the decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region, dated December 1, 1987, which decision allowed the change of use assessment on the Appellant's property located in Branch LaHave, Lunenburg, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: WALTON W. COOK, Q.C., on behalf of the Appellant, Branch Developments Limited.

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

DECISION

A hearing was held on April 18, 1988, in the Council Chambers of the Municipality of the District of Lunenburg, Bridgewater, Nova Scotia, for the purpose of first hearing arguments relating to the jurisdiction of the Board to hear an appeal by **BRANCH DEVELOPMENTS LIMITED** from the decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region dated December 1, 1987, which ratified the assessor's change of use assessment on the Appellant's property located in Branch LaHave, Lunenburg, Nova Scotia. This hearing was held as preliminary to any hearing of the appeal issues on their merits.

The facts concerning the filing of the Notice of Appeal are straightforward and are not in dispute. The Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region issued its decision on December 1, 1987 and delivered to the Appellant on December 7, 1987. A Notice of Appeal dated January 19, 1988, was received by the Board on January 25, 1988. Affidavits were presented during the hearing (Exhibits B-1, B-2 and B-3) which indicated the following:

1. Mr. Robert F. Warren, Provincial Director of Assessment for the Province of Nova Scotia did not receive a copy of the Notice of Appeal.

2. Mr. Geary Romkey, Regional Director of Assessment for the Lunenburg Assessment Region did not receive a copy of the Notice of Appeal.

3. Donna Brown, Senior Assessment Clerk for the Lunenburg Assessment Region:

a) did receive a copy of the Notice of Appeal on January 26, 1988;

b) mailed a copy of the decision of the Regional Assessment Appeal Court on December 3, 1987, by certified mail;

c) the decision was received by the Appellant on December 7, 1987, as shown by proof of delivery slip signed by Nancy Conrad.

From the evidence given by Walton Cook, Q.C. President of the Appellant company, and from statements included in the Notice of Appeal and an Affidavit included therewith, Mr. Cook was hospitalized, with a severe burn injury to his leg, from December 20, 1987 until January 14, 1988 and continued treatment and rehabilitation until April of 1988.

Section 100(1) of the Assessment Act, R.S.N.S. 1967, states:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the recorder and the clerk of the municipality or town in which the property is situate, the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The purpose of the hearing was to review the facts and determine if the requirements of this Section 100(1) have been met as they relate to the timeliness of service and the persons upon whom the Notice of Appeal must be served. Mr. Cook in his appeal and in the Affidavit attached thereto and to some degree in his presentations to the Board argued that the time factor should be exempt under the Limitation of Actions Act, R.S.N.S. 1967. In addition, Mr. Cook argued very strenuously that the Board had wide powers of discretion relating to its interpretation of the Act and in its application of fairness to matters relating thereto. He argued that had he not been incapacitated he would have been able to study the Assessment Act in more detail and probably would have been able to meet all the requirements detailed therein.

Mr. Duplak argued on behalf of the Director, both at the hearing and in a Memorandum of Law received by the Board on March 16, 1988 and delivered to Mr. Cook on the day of the hearing that the appeal was served past the 30-day requirement and that there was no provision for extension of this time. He further argued that the appeal had not been served on the required persons and that the Limitation of Actions Act provides for actions only and not for appeals.

In reviewing the information provided the Board has identified the following issues:

1. Was the appeal filed in the appropriate time span and if not does the Board have the power to extend such time for cause?
2. Does the Limitation of Actions Act apply in this case?
3. Were the appropriate persons served in this case as required by Section 100(1)?

There is no question that the appeal was filed in excess of the 30-day requirement. This leaves the Board with the question as to whether or not it has the power to extend this 30-day time period for suitable cause. There are sections of the Assessment Act which do permit an extension of time for filing various notices of appeal at the regional assessment level. However, the Act does not contain any such provisions as it relates to the powers of the Board nor does the Municipal

Board Act, S.N.S. 1981, C. 9. In fact, the final phrase of Section 100(1) states: "...and not otherwise."

The Board has reviewed a number of the cases referred to by Counsel for the Director including the case of Alan K. MacKinnon v. Director of Assessment, (1983) 2 M.B.D. 151; and Arthur Spiropoulos v. Director of Assessment, (1983) 2 M.B.D. 174. These cases only serve to confirm a strict interpretation by the Board of the requirements of Section 100(1) of the Assessment Act.

Mr. Cook, during the course of the hearing, stated that:

> "A technical measure ordinarily in law, in society, in anything that we do should never bar a person to relief, if relief is a thing that will lead itself to an obvious fair and just conclusion"

He goes on later in the hearing to state that if an appeal is turned down because of a technical measure:

> "...then the Legislature, the law, the Assessment Act is not only harsh, it is cruel and it is wrong. I don't believe a technical matter should bar fairness and justice to me or anyone else in God's world."

The Board is charged with the duty of administering the Acts for which it has been made responsible. In doing so, the Board does have a duty of determining the intent of the Legislature when it interprets these Acts and in particular, in this case, the Assessment Act. The Board, in the past, has given a very strict adherence to the requirements of Section 100(1) of the Assessment Act. The Board must assume that since there was relief given for an extension of the filing times in

Section 98 of the Act the Legislature, by adopting such firm wording as used in this Section 100 did not intend to grant such relief to appeals to the Board. If as Mr. Cook suggests this legislation is wrong, then the relief is to be sought at the legislative level and not in an expansion of the interpretation of the discretionary powers of the Board. The Board cannot question whether the legislation is right or wrong in not giving any provision for extension of filing time for an appeal to itself.

Before denying the right of appeal because of the late filing of the appeal, the Board reviewed the arguments concerning the Limitation of Actions Act. Mr. Duplak in his Memorandum of Law submitted that the Nova Scotia Supreme Court Appeal Division has already dealt with this point and held that the Limitation of Actions Act does not apply to an appeal. This was contained in a decision of Hawker Siddeley Canada Inc. v. Walter Angus Farrell and Workers' Compensation Appeal Board (1987), (unreported) S.C.A. 01851. He also goes on to say that this was the position of the Board in the Spiropoulos case previously mentioned. Mr. Cook during the course of his arguments in fact did admit that he was "probably in agreement" that the Limitation of Actions Act did not apply to appeals but continued to argue that because that Act permits extensions of time the Board should be able to exercise discretion and do so as well.

However, the Board must follow the decision of the Nova Scotia Supreme Court and determine that the Limitation of Actions

Act does not permit an extension of the time for filing an appeal as requested by Mr. Cook on behalf of the Appellant.

The Board denies the appeal for the reason that the Notice of Appeal was filed in excess of the thirty-day notice period required by Section 100(1) of the Assessment Act.

Counsel for the Director also raised the point that the appropriate people were not served with the notices of appeal as required by Section 100(1) of the Assessment Act. The Board acknowledges that it did receive the notice. From the Affidavit of Robert Warren, Director of Assessment for the Province of Nova Scotia, it is clear that he did not receive a copy of the Notice of Appeal.

Section 190 of the Assessment Act states that:

> "Any notice required by this Act to be served on the Director shall be sufficiently served if served on a regional director of assessment or delivered to an assessment office maintained by the Director."

It is clear from the Affidavit of Geary Romkey, Regional Director of Assessment for the Lunenburg Assessment Region that he did not receive a copy of the Notice of Appeal. However, the Affidavit of Donna Brown, Senior Assessment Clerk and Recorder for the Lunenburg Assessment Region, indicates that she in fact did receive a copy of the Notice of Appeal on January 26, 1988. The point was not raised during the course of the hearing as to whether or not this would constitute delivery to an assessment office maintained by the Director or not. The Board notes that prior to amendment of the Assessment Act Section 100(1) did require that a notice be served on the Recorder of the

Municipality. It is no longer a requirement. The Board also notes from the letter of enclosure attached to the Notice of Appeal received by the Board on January 25, 1988, that a copy of the Appeal was sent to the Municipality of Lunenburg and to the Regional Assessment Appeal Court at the same address from which the original decision of the Regional Assessment Appeal Court was mailed. As this matter was not discussed before the Board or raised by the Board at the hearing and the fact that the appeal has already been denied on the basis of time, the Board will make no further comments on this matter.

Counsel for the Director has requested that costs be awarded to the Director should the Board find that it does not have jurisdiction. Mr. Duplak in his argument stated that:

> "The Appellant is represented by experienced counsel. Counsel is well familiar with the law and the legislation in this area and in any event is deemed to be well aware of the legislation and law in this area. They have failed in their proper method to appeal to the Board."

The Board has some sympathy with this argument and further notes that relevant information concerning appeals had been provided to the Appellant with delivery of the Regional Assessment Appeal Court's decision.

However, on review of the testimony concerning the severe burn suffered by Mr. Cook, the Board accepts that Mr. Cook was operating under a "handicap" and was "incapacitated" during this time period and accepts his testimony concerning the treatment of his leg and the state of his mind at this time. The Board also notes that this was a preliminary hearing only and that other than travel costs and some mailing costs neither party had experienced any direct out-of-pocket expenses. Under the circumstances relating directly to this case, the Board determines that no costs will be awarded to either party.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 28th day of April, A.D., 1988.

Michael E. Johnson

MICHAEL E. JOHNSON, C.A.,
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

MAHER v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - MARKET VALUE - FLOODING IN BASEMENT - ASSESSMENT ACT, S.S. 101(1)

This is an appeal by J.F.M. from a decision of the Halifax County Regional Assessment Appeal Court which reduced the 1986 assessment from $65,000.00 to $55,000.00. The property is a semi-detached, two-storey residence containing 1160 square feet with a full basement located in the Forest Hills subdivision. Flooding occurred in the basement between May 1985 and early 1986. There was no evidence as to need for corrective action or costs.

HELD: The Appeal is dismissed and the market value for assessment purposes is confirmed at $55,000.00. No costs are awarded.

The assessor had reduced his initial assessment from $65,000.00 to $55,500.00. The assessor excluded the improvements to the basement in his calculations. Market value and not replacement cost is proper method. Flooding now ceased and allowance for a water problem cannot go on indefinitely.

NSMB-163-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, Chapter 14, R.S.N.S. 1967, as amended;

- and -

IN THE MATTER OF: An Appeal by **J.F. MAHER** from the decision of the Nova Scotia Regional Assessment Appeal Court, Halifax County Assessment Region, dated the 29th day of September, 1987, which decision reduced the assessment of the Appellant's property and dwelling located at 41 Arklow Drive, Cole Harbour, Halifax County by $10,000.00 from $65,000.00 to $55,000.00.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: J.F. MAHER, on his own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

DECISION

A hearing was held on April 22, 1988, in the Boardroom of the Nova Scotia Municipal Board in Halifax on an appeal by **J.F. MAHER** from the decision of the Regional Assessment Appeal Court, Halifax County Assessment Region dated September 29, 1987, which reduced the residential assessment of the Appellant's property and dwelling located at 41 Arklow Drive, Cole Harbour, Halifax County by $10,000.00 from $65,000.00 to $55,000.00.

The Notice of Appeal dated November 6, 1987, was received by the Board on November 9, 1987. The grounds of appeal were that the decision of the Regional Assessment Appeal

Court was "arbitrarily based on general information available and not ascertained by the specific situation on particulars involved".

There was no objection to the Board's jurisdiction from the Director of Assessment and upon reviewing the information available the Board determined that the requirements of Section 100(1) of the Assessment Act, R.S.N.S. 1987, had been met and the Board assumed jurisdiction and heard the appeal on its merits.

The property is located at 41 Arklow Drive, Cole Harbour, Halifax County. The building is a semi-detached, two storey residence containing 1160 square feet of floor area with a full basement and an outside deck of 160 square feet. The property is situated in a neighbourhood consisting of residential streets located in Forest Hills subdivision, made up of single family, semi-detached and town house dwellings. This area is one of the first phases in Forest Hills. The property is zoned R-2.

Mr. Maher gave testimony on his own behalf and related to the Board the circumstances surrounding the purchase of his house at 41 Arklow Drive in May, 1985. He stated that his basement flooded in early June within a few days after taking possession of the house. Flooding occurred one or two times subsequent to this with the last time being somewhere in the first half of 1986. The flooding apparently occurred through a hole which had been left open in the basement floor by the contractor. Mr. Maher also stated that a number of other neighbours had experienced the same flooding problems during a similar time period. None of the neighbours testified. Mr. Maher indicated that on May 28th, 1985, he had paid $57,000.00, for the house which was then assessed at $42,500.00. This assessment was increased to $65,000.00 at the next insuing assessment year. Mr. Maher appealed that amount to the Regional Assessment Appeal Court.

During direct testimony and in cross-examination it was indicated that the occupant of the adjacent half of the semi-detached (39 Arklow Drive) shared with Mr. Maher had also experienced water problems in the basement on or about the same time as Mr. Maher. This neighbour had sealed the hole in the basement floor and subsequently refinished the basement to a high degree and sold the property. The new neighbour at 39 Arklow Drive has not experienced any water problem according to the evidence presented.

Counsel for the Director called Mr. James P. Amyott the Senior Assessor for the Halifax County Assessment Region. Mr. Amyotte was qualified as an expert in the area of assessment and gave evidence on his methods of estimating market value of the subject property as is shown in the Exhibit M-1.

Mr. Amyotte reviewed the calculations used in arriving at the estimates of value for assessment purposes by the cost approach and by the market data approach. In arriving at a value by the cost approach he had used a value of land of $13,000.00 which he determined by direct market comparison. He then calculated the replacement costs of the subject property which was depreciated at an appropriate rate and added to the cost of the land arriving at a value of $58,900.00 to which a general level of assessment of 92.5%, which he considered appropriate for the area, was applied arriving at a rounded value of $54,500.00 for assessment purposes based on the cost approach.

In his testimony, Mr. Amyotte stated that he had applied no replacement cost calculation to the finished portion of the basement for the subject property which is indicated to have been completed to the extent of having a fully tiled ceiling, panelled walls, an uncarpeted sub-floor and appropriate finishing. He indicated that, rightly or wrongly, he had not provided for replacement costs in his calculation because of the perceived water problem in the basement and the fact that the basement was being mainly used for storage and not as a finished room.

Because the property was a single family, owner-occupied residence, producing no revenue, and yielding no income flow to capitalize the Income Apprach to valuation was not considered for the subject property by Mr. Amyotte.

Mr. Amyotte then proceeded to review his calculations which he used in arriving at his recommended value by using the market data approach. He compared the subject property to sales in eight other similar properties in the area, one property of which was sold three times within a two-year period and another was the adjacent portion of the semi-detached at 39 Arklow Drive.

He then reviewed the procedures and the adjustments necessary to make the various houses comparable including the exclusion of a finished basement. Having arrived at a value of $60,000.00 through this method he then applied the general level of assessment of 92.5% arriving at a value of the subject property for assessment purposes of $55,500.00 using the market data approach to valuation.

Mr. Amyotte stated that the market data approach is the most reliable method of valuation, stating further that a of the same property more than once adds further weight to any calculation of market value. Mr. Amyotte at the conclusion of his report at page 46 (Exhibit M-1) states the following:

> "The following estimates of value are indicated:
>
> | | |
> |---|---|
> | COST APPROACH | $54,500 |
> | INCOME APPROACH | NOT APPLICABLE |
> | MARKET DATA APPROACH | $55,500 |
>
> The values indicated by the cost approach and market data approach are quite similar. When proper sales data is available, such as presented in this report, the market data approach is considered to indicate the most reliable test of value. After a review of the arrayed data, and consideration of sales 1 through 8, in my opinion the value of the subject property, 41 Arklow Drive, as of January 1, 1986, is considered to be:
>
> FIFTY-FIVE THOUSAND FIVE HUNDRED DOLLARS"

The facts as detailed in Mr. Amyotte's report were not contradicted during the hearing.

The Board has reviewed the assessor's report in some detail and notes that even with the inclusion of a finished basement (approximately $3,000.00 or less) the report does not support the original assessment of $65,000.00 and obviously the original assessment was high. From a review of the decision of the Regional Assessment Appeal Court it is not clear if the total reduction granted by it was because of water problems or partly because of evidence of the Assessment Department including "further descriptive details of the subject property... as well as comparisons of the subject property to others in the same general area". Section 101(1) of the Assessment Act requires the Board to inquire into the matter "de novo". Therefore the Board must determine the facts itself and not try to interpret the decisions of others and the reasons therefor.

Through Mr. Amyotte's testimony and including cross-examination by Mr. Maher and questions from the Board, it was indicated that both the Appellant and the assessor had been informed that at some time during the early part of 1986 an obstruction had been discovered in the storm sewer in the neighbourhood of the subject property. This obstruction had caused an accumulation of branches and silt within the drain which may or may not have had some effect on the flooding being experienced in the neighbourhood at that time. The obstruction was subsequently removed by the engineering department of the County of Halifax. Although there was no direct evidence offered in support of this information, it is noted by the Board and supported by the witnesses at the hearing that there appeared to be no more flooding in the neighbourhood subsequent to the clearing of this storm drain.

The Board interprets Mr. Maher's grounds for appeal and arguments during the appeal to center around the fact that while he accepts that a fair market value of the property may be approximately $60,000.00, a prospective purchaser of the property would not pay that amount of money once being informed that there had previously been a water problem in the basement of the property. The Board also notes that Mr. Maher, having previously experienced water problems in his basement, has no confidence in his ability to make use of the space for fear that the problem may re-occur in the future and therefore is unwilling to spend any money to fix it up to a totally usable condition.

The Board is of the opinion that the assessor in carrying out his calculations of the estimate of value of the subject property has given due consideration to the fact that the basement is felt to be unsuitable by the Appellant. There is some question as to whether the assessor is correct or not in excluding the existing improvement to the basement in his valuation. He has nonetheless excluded it in all his calculations and the Board is not about to question his motives in this case. He obviously felt that some adjustment was fair and has chosen this method to achieve it.

The Board also notes that it has been approximately two years since any flooding has occurred in the house. While sympathizing fully with Mr. Maher's fear of recurrence of the flooding the Board does not believe that an allowance for a water problem which at present may be more perceived than real can go on indefinitely. Mr. Maher has not offered any evidence that he sought advice from experts to determine if a problem still exists, what corrective action may be necessary and at what cost. He did state that he has received conflicting advice concerning the sealing up of the hole in the basement floor from various County officials.

The Board notes that the grounds of appeal stated that the Regional Assessment Appeal Court based its decision on general information and not on specifics. The Board finds itself in a similar situation in that no direct evidence relating to the specifics of the problem have been presented to it.

The Board accepts the method employed by the assessor in this case but notes that the value for assessment purposes of the property, in his opinion, is $55,500.00 which is within $500.00 of the amount set by the Regional Assessment Appeal Court at $55,000.00.

Consequently, the Board dismisses the appeal and confirms the value placed on 41 Arklow Drive by the Regional Assessment Appeal Court in the amount of $55,000.00.

The Director has specifically requested that no costs be assessed in the matter and the Board on review of the circumstances dismisses the appeal without costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 4th day of May, A.D., 1988.

Michael G. Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

REVENUE HOTELS LTD. v. DIRECTOR OF ASSESSMENT

CITY OF HALIFAX v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL - INCOME APPROACH - HOTEL - ASSESSMENT ACT, S.S. 7(2)(a)(iii), 7(2)(c).

These are appeals by R.H. Ltd. and the City from a decision of the Halifax City Regional Assessment Appeal Court which reduced the 1984 and 1985 assessment of the Hotel Nova Scotian from $5,963,100 to $2,980,100. The 314-room hotel was purchased from C.N. in 1981 for $3,200,000. The sale price was broken down by the parties as Land - $800,000; Buildings - $1,400,000 and Chattels - $1,000,000. The evidence was that the Hotel was in a state of considerable deterioration when purchased and in addition a steam generator was required to heat the hotel and drive the air conditioner.

HELD: The commercial assessment for the hotel property for 1984 is $2,999,300 and for 1985 $3,159,000. Business occupancy is set at 25% of assessed value. Commercial assessment and business occupancy of 2 lots leased from C.N. are set as well. Costs are awarded against the City.

The Income Approach and not Discounted Cash Flow Approach is the proper method of valuation. Use of actual net income from previous year to determine value is appropriate for hotels. It is necessary to deduct an amount for deferred maintenance where an adequate maintenance program has not been carried out.

NSMB-122-85-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: The Assessment Act, R.S.N.S. 1967, c. 14;

- and -

IN THE MATTER OF: Appeals by the **CITY OF HALIFAX** and **REVENUE HOTELS LIMITED** from the decisions of the Regional Assessment Appeal Court, Halifax City Assessment Region dated September 13, 1985, with respect to the assessment of property known as the **HOTEL NOVA SCOTIAN** for the years 1984 and 1985.

BEFORE: ROBERT H.N. BLOIS, Q.C.

COUNSEL: MARY ELLEN DONOVAN, LL.B., on behalf of the City of Halifax;

DAVID MILLER, LL.B., on behalf of Revenue Hotels Limited;

MARIAN F.H. TYSON, LL.B., on behalf of the Director of Assessment.

DECISION

Separate appeals were filed with the Board on behalf of the City of Halifax and Revenue Hotels Limited against the decisions of the Regional Assessment Appeal Court, Halifax City Assessment Region dated September 13, 1985, with respect to the 1984 and 1985 assessments of property known as the **HOTEL NOVA SCOTIAN** located to the east of Hollis Street in the southeastern section of the peninsula portion of the City of Halifax. The property is generally bounded on the north by Terminal Road and on the south by the C.N.R. Station, on the west by Hollis Street and on the east by Marginal Road. The Hotel property is zoned Hotel Zone (HZ) under the City's Land-Use By-Law.

The subject property is assessed for 1984 and 1985 under three separate assessments, (1) the 314-room hotel and the 153,186 sq. ft. parcel of land on which the hotel is situate, (2) a small 6,803 sq. ft. parcel of land (Lot A) situate at the front of the hotel which is leased from the Canadian National Railway (C.N.R.) and (3) an 85,211 sq. ft. parcel of land (Lot B) situate at the rear of the hotel which is also leased from the C.N.R. and which forms part of the hotel's parking lot.

The Notice of Appeal on behalf of the City of Halifax (hereinafter referred to as the "City") is dated October 18, 1985, and was received by the Board on the same date. It is filed as Exhibit R-1. This Notice states that the Regional Assessment Appeal Court reduced the 1984 and 1985 assessments of Revenue Hotels Limited (hereinafter referred to as "Revenue") to the amount of $2,980,100.00. The hotel property had been assessed for both 1984 and 1985 in the amount of $5,963,100.00.

The City's grounds of appeal as set forth in the Notice of Appeal are as follows:

> "1. THAT the amount of the assessment and the Decision of the Regional Assessment Appeal Court is lower than the actual cash value of the Respondent, Revenue Hotels Limited lands;
>
> 2. THAT in its Decision, the Regional Assessment Appeal Court failed to have proper or any regard to the assessment of all properties in the Municipality as to ensure that taxation should fall in a uniform manner upon all property in the Municipality;

3. THAT the amount of the assessment is arbitrary and unsupported by the evidence;

4. THAT the Regional Assessment Appeal Court acted on wrong principles of law in setting that assessment;

5. THAT the Regional Assessment Appeal Court erred in undervaluing the lands of the Respondent, Revenue Hotels Limited;"

The Notice of Appeal on behalf of Revenue Properties Limited (hereinafter referred to as "Revenue") is dated October 18, 1985, and was received by the Board on the same date and is filed as Exhibit R-2. The appeal by Revenue is in "respect of certain lands assessed to and occupied by the Appellant for the years 1984 and 1985 and business occupancy assessments in respect thereof as follows:

1. Front Lot Parcel A (Hollis Street, Halifax, Nova Scotia)

Property Account Number: 57-013290-022-000-000
Assessment Appeal Number: 84-01-1651, 85-01-007
Docket Number: 018

Commercial Assessment: $68,000.00

2. Front Lot Parcel A (Hollis Street, Halifax, Nova Scotia)

Property Account Number: 57-013290-022-000-001
Assessment Appeal Number: 84-01-1655, 85-01-0069
Docket Number: 018

Business Occupancy Assessment: $17,000.00

3. Rear Lot Parcel B (Terminal Road, Halifax, Nova Scotia)

Property Account Number: 57-013290-021-000-000
Assessment Appeal Number: 84-01-1650, 85-01-0072
Docket Number: 018

Commercial Assessment: $340,800.00

4. Rear Lot Parcel B (Terminal Road, Halifax, Nova Scotia)

Property Account Number:	57-013290-021-000-001
Assessment Appeal Number:	84-01-1653, 85-01-0071
Docket Number:	018
Business Occupancy Assessment:	$85,200.00"

The grounds of appeal by Revenue are as follows:

"1. THAT the amount of the assessment and the Decision of the Regional Assessment Appeal Court is greater than the actual cash value of the Appellant's lands;

2. THAT in its Decision, the Regional Assessment Appeal Court failed to have proper or any regard to the assessment of all properties in the Municipality so as to ensure that taxation should fall in a uniform manner upon all property in the Municipality;

3. THAT the amount of the assessments is arbitrary and unsupported by the evidence;

4. THAT the Regional Assessment Appeal Court acted on wrong principle of law in setting the assessments;

5. THAT the Regional Assessment Appeal Court erred in overvaluing the lands of the Appellant;

6. THAT each of the business occupancy assessments is in excess of 25% of the proper assessed value of such lands;

7. THAT the Regional Assessment Appeal Court failed to value such lands for assessment purposes as a part of the overall operations of the Hotel Nova Scotian at Halifax; and,

8. Such other grounds as may appear."

These appeals were brought pursuant to Section 99 of the Assessment Act, R.S.N.S. 1967, C. 14, which states that:

> "Any person aggrieved by a decision of the assessment appeal court including the clerk on behalf of the town or municipality and the Director, may appeal therefrom to the Nova Scotia Municipal Board."

Section 101(1) states that:

> "The Nova Scotia Municipal Board shall inquire into the matter de novo, and shall examine such witnesses and take all such proceedings as are requisite for a full investigation of the matter."

At the commencement of the hearing on March 2, 1987, counsel for the parties agreed that both appeals were brought within the statutory time limit for filing appeals and that all statutory notices required were in fact given. The Board being satisfied that both appeals were properly before the Board assumed jurisdiction and proceeded to hear the appeals.

The hearing commenced on March 2, 1987, and, at the request of the parties, adjourned from time to time and ended on October 13, 1987. A number of written submissions were filed with the Board, the last ones having been received by the Board on October 28, 1987. Sittings of the Board were held on 16 days during this period. Nineteen witnesses testified and 62 exhibits were filed.

Counsel for Revenue filed a lengthy pre-hearing memorandum dated February 18, 1987, in which he referred to the appraisal reports prepared by appraisal experts on behalf of the City, Revenue and the Director of Assessment. He sets out what he considers to be the principle issues relating to the appeals, viz:

> "1. Should the properties under appeal all be appraised individually or as a group and then the overall value apportioned arbitrarily or otherwise for assessment purposes only;
>
> 2. What is the appropriate valuation approach;

3. How should the issue of deferred maintenance be treated;

4. How should the necessity for the hotel to install its own steam plant be treated;

5. What is the appropriate method to value the furniture, fixture and equipment used in the hotel and what is the appropriate value for assessment purposes;

6. How should the interest on operating capital be treated for assessment purposes;

7. What is the appropriate capitalization rate."

The Board agrees that the above are the principle issues in this case.

The hotel was purchased by Revenue in 1981 from the Canadian National Railways (C.N.R.) for a total price of $3,200,000.00 which by agreement of the parties to the sale was broken down as follows:

Land	$ 800,000.00
Buildings	1,400,000.00
Chattels, equipment and stock in circulation	1,000,000.00
TOTAL	$3,200,000.00

The above figures are set forth in a letter dated February 24, 1981, from the C.N.R. to Revenue Properties Company Limited, a copy of which is found in Exhibit R-6 under tab "F". This letter states inter alia that the offer to purchase the Hotel Nova Scotian had been accepted by C.N.R. subject to certain conditions outlined in the letter, one of which is the breakdown of the purchase price as above noted. This letter was executed under seal by signing officers on behalf of both the vendor and the purchaser.

A Statement of Adjustments as of May 1, 1981, on the sale appears under tab "F" of Exhibit R-6 which indicates that the purchaser paid the C.N.R. $100,490.72 for "Inventories" in addition to the purchase price of $3,200,000.00.

The Statement of Adjustments indicates inter alia that the "Purchaser agrees to pay direct health services tax of 8% on chattels of $1,000,000.00, i.e., $80,000.00."

Although Revenue Properties Company Limited agreed to purchase the Hotel Nova Scotian, it appears that the hotel's ownership became vested in Revenue Hotels Limited (one of the Appellants herein) which acted as the nominee for two joint venturers, Revenue Properties Company Limited and Westok Holdings Limited, each of whom held a 50% interest in Revenue Hotels Limited. The joint venture's only activity was the operation of the Hotel Nova Scotian. The joint venture relationship is shown on the notes to the financial statements of the Hotel Nova Scotian for the years ending December 31, 1982, 1983, 1984 and 1985. Copies of these financial statements appear under tab "G" of Exhibit R-6.

The Hotel Nova Scotian was constructed in two parts, the original part (the south wing) having been built in 1929 and the newer or north wing in 1959. There is no air conditioning in the south wing. The hotel is situate outside the City's Central Business District (CBD) where all but two of the City's major hotels are located. When the original hotel was constructed in 1929, the site was a very desirable one being immediately adjacent to the C.N.R. Station. This location, being far removed from the CBD where the major office buildings, restaurants and retail shops are now located, makes it difficult for the hotel for locational reasons to compete with the newer hotels located within the CBD.

The evidence clearly indicates that the Hotel Nova Scotian was in a state of considerable deterioration in 1981 when it was sold by the C.N.R. Inadequate maintenance of the hotel building had been carried out by the C.N.R. and a great amount of repairs and improvements were necessary to make the hotel reasonably functional. The Hotel Nova Scotian had been built as a convention type of hotel and a large portion of its business related to the convention trade. With the construction of the Sheraton Hotel and the World Trade and Convention Centre in downtown Halifax the Hotel Nova Scotian found it was gradually losing its important convention trade. Also with the enlargement of the Citadel Inn and the opening of the Barrington Inn, the Hotel Nova Scotian was faced with strong competition from first-class hotels, including the Chateau Halifax located in a more advantageous area of the City.

At the time of the sale of the Hotel in 1981 it was well known that the purchaser of the Hotel would be faced with a large expenditure to install a steam generator resulting from the decision of the Nova Scotia Power Corporation (N.S.P.C.) to discontinue supplying steam to the hotel. This decision arose out of the fact that the N.S.P.C. was planning to close down its steam generating plant on Water Street which had supplied steam to the hotel for heating purposes for the entire hotel as well as to drive the hotel's air conditioning chiller used in the north wing.

The main evidence on value was given on behalf of the City by Michael Turner, a qualified appraiser whose firm, Turner, Drake & Partners Limited, produced an appraisal report of the hotel property filed as Exhibit R-7. This report concluded that the 1984 assessment for the hotel should be $4,235,000.00 and $4,558,000.00 should be the assessment for 1985. The Turner Drake report states that "Since the subject property is income producing and appeals primarily to the investment sector, the Cost and Market approaches are not the most reliable indicators of value." This report also states that the Income Approach alone to value was therefore used. The report also states that the land was not valued "as if vacant, but rather as an integral part of the income producing unit".

The Turner Drake report is based on the "Discounted Cash Flow" (D.C.F.) technique to arrive at market value for assessment purposes of the subject property. With regard to methodology, the report states that the D.C.F. approach takes into account the renovations and capital improvements as well as the deferred maintenance evidence in the subject property during the assessment years under appeal.

The main evidence of value on behalf of the Director of

Assessment was given by Denvert Levy, the Regional Director of Assessment for the Halifax City Assessment Region. Mr. Levy employed the "Income Approach" to his valuation of the Hotel and relied on financial data and other relevant information pertaining to the calendar year 1982.

Mr. Arthur Speed, a qualified real estate appraiser of long standing, prepared an appraisal report and gave the main evidence on behalf of the hotel owner, Revenue Hotels Limited.

All of the expert appraisal witnesses were in agreement that the proper and best way of evaluating the subject hotel was by the so-called "Income Approach" to value rather than either the Cost Approach or the Market Data Approach. The Market Data Approach was not appropriate as there were no recent sales of a comparable hotel property. The Cost Approach was not appropriate in this case since the subject property is an income producing property and the investor in this type of property would likely employ the "Income Approach" to calculate the value by capitalizing the net operating income (N.O.I.) at an appropriate cap. (capitalization) rate.

Although Mr. Turner, Mr. Speed and Mr. Levy all used the "Income Approach" to value, they each applied different versions of the "Income Approach" and thus all three arrived at different levels of value for the two assessment years in issue (1984 and 1985). Mr. Turner's estimate of value employing his methodology of the D.C.F. technique resulted in his estimates of value for the two years in question being substantially higher than the other two.

The D.C.F. is a methodology of applying the Income Approach to value by placing a present value on future income, taking into account the changes in the future income which are projected from present data. Mr. Turner used a 10-year period for his projections of income, that is, the years 1984 to 1993. He, however, had actual figures for eight months of 1981, and for each of the years 1982, 1983, 1984 and 1985.

Section 38 of the Assessment Act, R.S.N.S. 1967, C. 14, deals with the valuation of property and states inter alia that "...all property shall be assessed at its fair market value...". The full text of Section 38 as it applies to the 1984 assessment year reads as follows:

> "38 All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all property in the town or municipality."

Section 38 was amended in 1984 by C. 15 of the Acts of Nova Scotia, 1984, and the full text of this Section as it applies to the 1985 assessment year reads as follows:

> "38(1) All property shall be assessed at its market value, such value being the amount which in the opinion of the assessor would be paid if it were sold on a date prescribed by the director in the open market by a willing seller to a willing buyer, but in forming his opinion the assessor shall have regard to the assessment of other properties in the town or municipality so as to ensure that taxation falls in a uniform manner upon all residential and resource property and in a uniform manner upon all commercial

property in the town or municipality."

The Board is satisfied from the evidence that the "Income Approach" to value is the proper and indeed the correct approach to determine the assessed value of the hotel property for the assessment years 1984 and 1985 in compliance with Section 38 of the Assessment Act.

The Chairman of the Regional Court, whose decisions are under appeal to this Board, adopted the recommendation made by the Director of Assessment in fixing the assessment of the hotel for 1984 and 1985 in the amount of $2,980,100.00. He found that "the assessor has used a proper method of valuation in this assessment, which is both normal for commercial properties and uniform with all commercial assessment in Halifax". He also stated inter alia that "The major expense factor in determining the net income of this property for assessment purposes which has led to the recommended reduction herein is that regarding deferred maintenance. It was argued on behalf of the City that deferred maintenance should not be used as an expense. I find that the evidence presented amply demonstrates that deferred maintenance is an appropriate charge to revenue in this case".

The Chairman of the Regional Court in his decision appears to have given some considerable weight to the purchase price of the hotel by Revenue. He states that "It is to be noted that the subject property was purchased by the Appellant in May, 1981, for a sum of approximately $2,200,000.00, this figure being exclusive of amounts attributable to hotel furniture, fixtures and equipment. There is no evidence to suggest that this purchase was anything other than a bona fide arm's length transaction, and this purchase price must be strongly indicative of the market value of the property at that time."

At the commencement of the hearing counsel for the City, the Director and Revenue made opening statements. Counsel for the City in her opening statement, after referring to the fact that the original assessment for the hotel for 1984 was approximately $5.9 million and was substantially reduced by the Regional Court, stated that "the City's position essentially is, particularly with respect to the Speed report, that with the value that's been put on the property, it's so low that you are left without any value for the building". She stated that the City would not be contesting the capitalization rate of 14% employed by both Mr. Speed and Mr. Levy. Counsel for the City stated that she intended to call Mr. Douglas Cherry, a chartered accountant, as one of its witnesses. Mr. Cherry was not available to appear at this time and would not be available until March 13th.

Counsel for Revenue objected to the Board allowing the City to call Mr. Cherry after the City's case and Revenue's case was opened and closed since no report by Mr. Cherry had been given to him and he would not know what evidence Mr. Cherry was going to give. Mr. Miller argued that Mr. Cherry "should not be heard but if he is to be heard, in fairness to the Respondent, the City shall open and close its case before the hotel proceeds".

Mr. Miller stated that he had outlined what he considered to be the issues in his pre-hearing memorandum. He said that the parties are in general agreement that the capitalized net income approach is the appropriate method of valuation.

Ms. Tyson, on behalf of the Director, in her opening remarks stated that "The Province will be attempting to establish that there is no way, no reasonable way that those parking lots which are not owned by Revenue Properties can or should be assessed to Revenue Properties in connection with the rest of the hotel". She indicated that the director would take issue with the manner in which Mr. Speed dealt with deferred maintenance and with the cost to the hotel of providing its own steam.

With respect to the City's request to have Mr. Cherry give evidence, Ms. Tyson stated that "There are no particular rules restricting who can given evidence or even that reports are filed... Therefore we can't object to the City calling Mr. Cherry, we don't object as a witness, as an expert, we would however like a report, something in writing to be submitted to us in advance of his testimony...".

The Board after hearing submissions from counsel agreed to hear the City's witnesses all but Mr. Cherry and then adjourn to a suitable time to hear Mr. Cherry after which witnesses for Revenue and the Director would be heard.

The City called as its first witness Denvert Levy, the

Regional Director of Assessment for the Halifax City Region, who appeared under subpoena. Counsel for the City stated that Mr. Levy was called to testify for the purpose of introducing as an exhibit a hotel/motel comparison sheet for the City prepared by the Assessment Department. She stated that this document compares the 1984 assessments for 15 different motels and hotels in the City and shows "such information as the capitalization rate used by the department in assessing each, valuing each motel or hotel, shows the number of units, it shows the occupancy rate, it shows the total income, total expenses, it shows the expenses as a percentage of income. It then reduces the expenses as a cost per unit, it then shows a net income and it shows the 1984 assessments that resulted and it shows the assessments as a percentage increase over the, I presume the previous assessment. Now, we feel that such information is very relevant...". Ms. Donovan stated she had received a copy of this document in confidence but was not authorized to show it to Mr. Turner, one of her expert witnesses.

Ms. Tyson, counsel for the Director, objected to the admissibility of this document on the basis that the information in it was given by various owners to the Assessment Department in confidence. She submitted that the information given by the various owners was given for the purpose of making each owner's assessment and because the information gives income and expense figures of these motels and hotels it is very "sensitive information". She submitted further that the information wasn't used by Mr. Levy to prepare the assessment of the subject property and was "a summary of the information prepared by the Assessment Division for their own use". She also argued that the Freedom of Information Act, S.N.S. 1977, C. 14, "prohibits the release of this kind of information". She said that the information contained in the document was obtained pursuant to Section 17 of the Assessment Act which provides as follows:

> "17(1) Every person shall give to the assessor all necessary information requested by him for the purpose of enabling him properly to assess the property of that person.
>
> (2) The Director may cause to be delivered to any person a request for relevant information required by him in order to make a proper assessment of the property or occupancy assessment of the person to whom the request is delivered.
>
> (3) Any request shall be sufficiently delivered if mailed by registered mail, postage prepaid, addressed to the person at the last address known to the assessor".

Counsel for the Director also submitted that the comparison sheet document in question was not relevant to the determination of the value of the subject property.

Mr. Miller, counsel for Revenue opposed the admission of this document on the basis that it was not relevant. He said that the Board was dealing with one particular hotel "and we have difficulty in seeing what the relevance is of all this financial information related to other hotels".

Ms. Donovan, counsel for the City, relied on the provisions of Section 200(2) of the Assessment Act in support of her position that the document in question should be admitted.

Section 200(2) reads as follows:

> "Any officer of a municipality, town or regional assessment appeal court shall, upon reasonable demand, have access to any assessment rolls, plans, maps, drawings, charts and records reasonably required for purposes of the municipality or town, and shall be entitled to make copies thereof".

Ms. Donovan argued that "confidentiality is not a basis for failure to provide information particularly required under subpoena and it's not a basis for refusing to provide information under Section 200(2)".

Mr. Levy testified that he was aware of a document entitled "Motels-Hotels Comparison Sheet" prepared by Sam Farrell of his office relating to 1984 assessments. Mr. Farrell was at the time of the preparation of the document the Acting Assistant Director and Mr. Levy was the Acting Director. He said that Mr. Farrell was responsible for valuing all hotels in the City for 1984. He did these valuations during the latter part of 1983. Each time Mr. Farrell placed a value on a hotel he would record data on his comparison sheet.

Mr. Levy was asked if this document had been used by him. He said that he would look at it when he received an appeal respecting an hotel. He said it "was an easy check, instead of digging out all the files to see what cap. rates, whatever was on the hotels, I'd just look at that sheet, it was easier". He said, however, that he did not use the Farrell document in preparing the Hotel Nova Scotian case for this hearing. He said that the original 1984 assessment of the hotel in the amount of almost $6,000,000.00 was based on information received by his department pursuant to the provisions of Section 17 of the Assessment Act.

In support of her position that the hotel comparison sheet document should not be admitted in evidence, counsel for the Director tendered the Affidavit of Robert F. Warren, the Director of Assessment for the Province of Nova Scotia. His Affidavit is filed as Exhibit R-24 and was sworn to on March 5, 1987. His Affidavit states inter alia that he had been served with a subpoena requiring him to produce all documents, notes, et cetera, "that would assist the Nova Scotia Municipal Board in determining the proper assessment of the Nova Scotian Hotel for 1983 and 1984 assessment years and, in particular, a document comparing the assessments, income and expenses of other motels and hotels in Halifax for the 1984 assessment year". His Affidavit states his opinion that the income approach is the most reliable method of assessing operating hotels and to use this approach, particulars of income, expenses and vacancy are necessary. His Affidavit states that the form requesting financial information from hotel owners under Section 17 of the Assessment Act specifies that the information will be "held confidential" and used for departmental purposes of assessment. His Affidavit states that he believes that it would be contrary to the public interest if the document in question was disclosed. In paragraph 12 of his Affidvit he states that the "information contained in the document would have little, if any, relevance to the determination of the value of that property". In paragraph

13 he states that he has been advised and believes that "the disclosure of the document referred to in paragraph 3 is prohibited by the Freedom of Information Act without the consent of the owners".

On April 1, 1987, a special sitting of the Board was convened for the sole purpose of hearing the testimony of Mr. Warren and to enable the parties to cross-examine Mr. Warren on his Affidavit.

Mr. Warren testified that he had never appraised property for assessment purposes using the income approach. He was asked: "Why was the form prepared?" He replied: "I didn't prepare it so I don't know". He did not state categorically that the comparison sheet document was not relevant but he did testify that it had little, if any, relevancy in determining uniformity of assessment of the other 14 hotels/motels with the Hotel Nova Scotian.

Following the hearing of Mr. Warren's evidence, the Board requested counsel to file written memoranda respecting the admissibility of the document in question. Counsel for the Director suggested that the Board should examine the document prior to making a decision as to its admissibility. Counsel for the other two parties expressed their non-objection to this suggestion and the Board agreed to examine the document. Counsel for the Director indicated that Mr. Warren's Affidavit had been filed primarily in support of the Director's argument that the document was inadmissible because of Crown Privilege.

On a resumption of the hearing on May 25, 1987, the Board announced that it would admit the document in question and it was filed as Exhibit R-29. It was admitted on the basis that it has some relevancy in the determination of the assessment in question. It is, in fact, a document prepared by a responsible official of the Assessment Department containing relevant information about the subject hotel and other hotels and motels in the City of Halifax. The Board expressed its opinion that Mr. Sam Farrell, the author of this Exhibit, should be called to testify as to the purpose and use of the document. In fact, Mr. Farrell was not called upon to testify. It is the Board's opinion that the Freedom of Information Act was not a bar to the admissibility of the document. It is also the Board's opinion that this is not a case where the Director can rely on Crown Privilege to prevent the document from being admitted in evidence.

Evidence on behalf of the City was given by Gloria P. McCluskey, President of the firm of Thorne & McCluskey Assessment Consulting Appraisers Limited. She appeared under subpoena and is a former employee of the Assessment Division of the Department of Municipal Affairs, having resigned in June of 1986 as the Assistant Provincial Director of Assessment for the Province of Nova Scotia. Ms. McCluskey is an accredited appraiser with the Canadian Appraisal Institute of Canada. She served as the Director of Assessment for the City of Halifax from June of 1978 to April of 1982 and prior to that was employed as an assessor with the City of Dartmouth from 1971 to 1978.

Ms. McCluskey testified that when she was the Director of Assessment for the City of Halifax Region, she determined that for the 1981 reassessment year all hotels and motels previously valued by the reproduction costs less depreciation approach were to be valued by the income approach. Because furniture, fixtures and equipment (F.F.&E.) are not assessable property under the Assessment Act she had to determine a method of obtaining the value of the F.F.&E. which would then be deducted from the capitalized net value of the hotel complex in order to determine the value of the hotel building and land. From inquiries she made of Lincoln North, an appraiser and author on the subject of hotel valuation, she learned that Revenue Ontario had been using a figure of 15% of the total hotel value as representing the value of F.F.&E. She employed 15% for purposes of doing the 1981 reassessments and used that percentage until the Municipal Board's decision in the Lord Nelson Hotel case which was critical of the use of a fixed percentage of total value to arrive at the value of F.F.&E. She said subsequent to the Lord Nelson Hotel decision her department recommended to the government that legislation be enacted to enable assessors to use the 15% method of determining the value of F.F.&E.

On cross-examination by counsel for Revenue, Ms. McCluskey was shown page 101 (Exhibit R-8) from a textbook written by Mr. Stephen Rushmore. This page states that a hostelry derives value from certain unique characteristics, one of which is F.F.&E., which includes "guest room, dining room, and lounge furnishings; kitchen equipment; front office and administrative equipment; and items of decor. These items can account for up to 25% of the total property value". Ms. McCluskey said that she couldn't take issue with Mr. Rushmore's reference to "up to 25%".

It is noteworthy that the Assessment Act now contains subsection (b) of Section 38 which provides that in determining the value of a hotel for assessment purposes where it is necessary to determine the value of the personal property used in the hotel it is deemed to have a value equal to 15% of the value of the hotel. Subsection (6) of Section 38 was not in effect for the assessment years in question (1984 and 1985).

Michael Turner testified that Richard Escott, his associate in the preparation of the Turner Drake appraisal report, determined that the value of the subject site excluding lands under lease from the C.N.R. was $1,382,263,00 and the value of the total site including the C.N.R. land was $2,228,792.00. He said that the land comprising the hotel site was valued by Mr. Escott at $9.20 a sq. ft. and $4.60 a sq. ft. was the value of the front parcel of land which is subject to a right-of-way in favour of the C.N.R.

Mr. Turner determined that $571,480.00 is the value of the F.F.&E. in the hotel. He arrived at this figure by estimating that the cost new of the F.F.&E. would be $2,857,400.00 ($9,100.00 per room x 314). He obtained the figure of $9,100.00 per room by obtaining the details of a number of Maritime hotels and indexed their original costs to January, 1983, using the Marshall and Swift Comparative Equipment Cost Index for the hotel industry. He then adopted the figure of $9,100.00 which approximates the median cost per room. He then applied depreciation of 80% partly based on tables prepared by Marshall and Swift. He thus deducted depreciation of $2,285,920.00 from $2,857,400.00 to arrive at $571,480.00 as the depreciated reproduction cost new of the F.F.&E.

Mr. Turner testified that he "was a wee bit concerned about that figure because there's really no way I felt that you could calculate with any degree of accuracy what the value for that equipment was, even if you carry out a full inventory of the hotel. The stuff is so old that your depreciation is always going to be very subjective".

On page 50 of Mr. Turner's report is a Statement of Operating Income showing actual figures for eight months of 1981 and for the years 1982 to 1993 inclusive and estimated operating income for the years 1982 to 1993 inclusive. It also shows the operating expenses and the net operating income flowing to the property. Mr. Turner in describing page 50 of his report stated that "we've assumed a debt service on the property even though the Assessment Act requires that we appraise it free and clear because the purchaser of this property would fund it with a mortgage and we've capitalized the after debt service cash flow to arrive at the market value, which is the standard way of discounted cash flow. So the total indicated value is $4,481,263.00 which is the fourth line up from the bottom...". He goes on to say that "we've deducted the furniture, fixtures and equipment from that to arrive at the indicated value of the real estate which we've rounded to $3,910,000.00 and that is the value as of the 1st day of January, 1983".

On pages 87 and 88 of his report Mr. Turner shows how his appraised value of $3,910,000.00 as of January 1, 1983, was increased to arrive at his assessment values for 1984 of $4,235,000.00 and $4,558,000.00 for 1985, by adding the cost of the improvements and deferred maintenance between Janury 1, 1983, and December 31, 1983, to the appraised value.

In his direct evidence Mr. Turner stated that in accordance with the Assessment Act he ignored mortgages on the property but added that it is "unrealistic today to value a property on the assumption there's no financing".

During his direct testimony Mr. Turner said he wished to make an adjustment to his valuation of the subject property as a result of an article by Stephen Rushmore entitled "Hotel Business Value and Working Capital: A Clarification". This article had appeared in the Appraisal Journal of January, 1987, and a copy of the article was filed as Exhibit R-12. The article came to the attention of Mr. Turner after he had prepared his original appraisal report. Mr. Turner's Statement of Operating Income shown on page 50 of Exhibit R-12 included an item shown as "Financing Expense". He testified that he had understood at the time of his report that these financing charges represented "the bank charges and the interest on the bank loan to cover the day-to-day operating expenses of the property". Subsequently he learned that the figures represented "the amortized cost of putting the long term debt in place".

Rushmore, at page 146 of his article (Exhibit R-12), states that it is not proper to deduct anything "from the stabilized income stream to remove the value attributed to the working capital component. While this procedure appears logical, its premise has one basic flaw - hotels typically have no working capital. Working capital is defined as current assets minus current liabilities. Almost every hotel operates at a negative current ratio, which means the current assets are less than the current liabilities. Essentially, hotel owners finance their current assets with their accounts payable and, therefore, allocating a return on a non-existent amount of working capital is not appropriate".

Mr. Turner was asked if he could quantify the adjustment required by adopting Mr. Rushmore's article. He said that by deducting all of the financing charges "which would be an over-compensation, it would result in an amended assessment for 1984 of $4,407,000.00" and $4,730,000.00 for 1985. He felt this would be an over-compensation because there are some bank charges in the total financing expense which are proper expense charges. Mr. Turner stated that by deducting all of the financing charges shown on page 50 of his report you thereby increase the hotel value by $172,000.00. His original figures shown at the beginning of his report are:

"1984 Assessment	$4,235,000.00
1985 Assessment	$4,558,000.00"

Richard J. Escott, a senior partner in the firm of Turner Drake & Partners Ltd. also testified on behalf of the City. Mr. Escott is an accredited appraiser having qualified as an A.A.C.I. in 1985. He is the executive secretary of the Nova Scotia chapter of the Appraisal Institute of Canada. He and Michael Turner jointly prepared the appraisal report respecting the Hotel Nova Scotian filed as Exhibit R-7. The Board accepted Mr. Escott as a witness qualified to give opinion evidence pertaining to the valuation of real property.

Mr. Escott gave detailed evidence as to how the steam portion of the energy expenses shown on page 48 of R-7 were developed. He indicated he had adjusted upwards the actual costs for the years 1982, 1983 and 1984 because of the fact that the hotel had been under-billed for those years on account of a metering error on the assumption that the hotel would be required to eventually pay for the amount of underbilling. After he heard the evidence of David I. Covill, an employee of the Nova Scotia Power Corporation that the hotel had not in fact been billed for the underbilled amount and it was unlikely that it would be billed, he "reran" his projections "based on the actual cost" and produced a revised page 48 filed as Exhibit R-26. His steam costs shown on Exhibit R-26 for the years 1982, 1983 and

1984 are substantially lower than the corresponding figures shown on page 48 of Exhibit R-7.

Mr. Escott stated he also revised his figures shown on page 50 of Exhibit R-7 "Statement of Operating Income" by deleting the "Financing Expense" items shown on item No. 23. His revised Page 50 was filed as Exhibit R-27. He indicated that these changes "resulted in an increase in the property value of the value we show at the bottom of page 50 of $417,000.00". His real estate value shown on page 50 of Exhibit R-7 is $3,910,000.00 whereas the revised figure on Exhibit R-7 is $4,327,000.00.

Mr. Escott testified that after making adjustments and revisions to the original appraisal report he arrived at a 1984 assessment value of $4,545,000.00 and a 1985 assessment value of $4,745,000.00.

Counsel for the City tried to introduce as an Exhibit through Mr. Escott some land value calculations relating to the subject property. Counsel for Revenue vigorously objected to the introduction of this document because he said it was not relevant since all parties had agreed that the Income Approach to value was the appropriate method to use in this case. He also argued that the City was attempting to make land values an issue which was not up to this time in issue and this would require Revenue's expert, Mr. Speed, to do a lot more work in preparing rebuttal evidence.

Counsel for the City while stating that the City was not directly challenging land values as determined by Mr. Levy, nevertheless wanted to adduce evidence from Mr. Escott as to land values which she argued would show that the value of the hotel as determined by Mr. Speed would result in a "minus value for the building". She submitted that the Escott land calculations indicated a square foot value of $9.20 for most of the land in question and this indicates there is something wrong with the Speed appraisal. Counsel for the City also submitted that there is no requirement that this type of report had to be given to the other parties in advance.

Counsel for Revenue submitted that "Mr. Speed's report is right or wrong. If he's right, he's right, if he's wrong, he's wrong, and if he's right and if the land value exceeds the property value on the income approach, so what?"

The Board decided it would admit the document entitled "Land Value Calculations" prepared by Mr. Escott and it was filed as Exhibit R-28. Mr. Escott said that this exhibit describes the methodology he went through "to derive an opinion of value for the subject property as a cleared site...". He researched sales and leases of what he considered comparable parcels of land in the City and then adjusted the sale prices for time, location and motivation "to reflect their differences with the subject property...". He then rated the reliability of these comparables as an indicator of value and derived a weighted average square foot value of $9.20 which he applied as follows:

"Indicated Value of Subject Property

Land subject to R.O.W.	5 880 ft.2	@ $4.60/ft.2	$ 27,048
Remainder	239 320 ft.2	@ $9.20/ft.2	$2,201,744
TOTAL	245 200 ft.2		$2,228,792
Rounded to			$2,229,000"

On cross-examination Mr. Escott stated that he had not made "a specific quantifiable adjustment for size".

Douglas W. Cherry, a chartered accountant since 1953 and at present a partner in the firm of Coopers & Lybrand, Chartered Accountants, gave evidence on behalf of the City. He was accepted by the Board as an expert witness "qualified to give evidence as to the value of business enterprises".

He prepared Exhibit R-31, being a report dated May 4, 1987, addressed to Ms. Mary E. Donovan, Solicitor for the City of Halifax. This report was prepared specifically for purposes of this appeal. He had reviewed inter alia the appraisal reports prepared by Turner Drake & Partners Ltd., the appraisal report of Denvert Levy, and the original Arthur Speed appraisal report. He said that the Turner report was the "discounted cash flow approach" to value whereas the Levy and Speed reports use the "income approach". "Each intended to reach the conclusion as to what the Nova Scotian Hotel, what the market value of the Nova Scotian Hotel was at a certain point in time."

In explaining these different methodologies Mr. Cherry stated that "Both have as their prime basis the philosophy that a willing seller would sell for and a willing buyer would buy for an amount which would have income or cash flow as a basic ingredient in the calculation. The philosophy or the theory is that a purchaser, for example, would be interested in the future benefits of the item to be valued expressed in terms of dollars and would take a decision as to a rate of return on his equity, and having those two factors would produce an amount that he would be willing to pay".

On direct examination Mr. Cherry was asked: "And in attempting to identify what the maintainable level of earnings are can you - what is your opinion as to whether there is any looking to the future in identifying those figures?" He replied that: "In any valuation exercise it is the view of the future that one is trying to get, and when one is charged with the responsibility to look into the future, one has to take into consideration many things and looking at the history is one of the things that one looks at, but in a correct valuation exercise one is really attempting to capture the future and express it in terms of dollars rather than to capture the past".

He stated that his report "is really a commentary on the Speed report". He said he agrees with the approach to value used by Mr. Speed. He made it clear, however, that he doesn't disagree with the Turner approach to value. He said that he generally accepts the judgment selections made by Mr. Speed in arriving at the stabilized net operating income. He stressed the point that "the capitalized value that is arrived at in the speed report, represents equity associated with rather than, or as opposed to, the value of a particular asset or a group of assets".

Mr. Cherry pointed out that his report states on page 2 that his firm was "not engaged to, and we did not make our own inquiries of the Nova Scotian personnel or examine its records; consequently, we do not purport, in this report or otherwise, to express an opinion on the value of any of the physical assets of the Nova Scotian or its business".

Mr. Cherry testified that "...the approach used in the Speed report is probably appropriate, and the information and financial data on which it is based generally appear to be sound and reasonable." He observed that Mr. Speed "...went after and obtained much the same information as I would go after and obtain if I were doing the valuation. And then faced with all this information he had to make a decision regarding the numbers that he was going to put down as being representative of what he thought the level of earnings of this hotel would likely be in the future. And what I'm saying is that I've looked at what he's done and by and large I don't quibble with what he's done, okay". Mr. Cherry, however, stated that he purported to correct what he considered errors made by Mr. Speed in his calculations. As a result of Mr. Cherry's adjustments he has restated the value of the hotel to be $4,391,000.00 as opposed to Mr. Speed's figure of $1,973,000.00 excluding the value of the C.N. leased land. The details of Mr. Cherry's adjustments to Mr. Speed's figures are set out on page 4 of Exhibit R-31, a copy of which reads as follows:

"The adjusted compilations, together with the Speed Report compilations, both in condensed form, are as follows:

	Per Speed Report $	As Restated by Coopers & Lybrand $
Net Operating Income per Speed Report	$ 809,176	$ 809,176
Add:		
Management fee-incentive	-	12,692
Operating interest	-	41,892
Reduction of steam costs	-	20,000
		$ 883,760
Deduct:		
Ground rent to CN	-	(34,000)
Imputed debt service on improvements	-	(106,000)
Municipal taxes	-	(150,000)
Adjusted Net Operating Income	$ 809,176	$ 593,760

	Hotel $	Commercial $	$
Net Operating Income	751,403	57,773	593,760
Capitalization Rate -Basic	14.00%	14.00%	14.00%
Re municipal taxes	4.17%	3.35%	see above
	18.17%	17.35%	14.00%
	$	$	$
Capitalized values (Equity)	$4,135,400	333,000	4,241,143
Less: Deferred maintenance (steam plant)	1,253,145		300,000
Equity after allowance for maintenance	$2,882,255	$ 333,000	$3,941,143

Add: Debt - Re capital improvements	-	-	700,000
Other (net)		-	350,000
	$2,882,255	$ 333,000	$4,991,143
Estimated value of assets		$3,215,000	$4,991,000
Comprising:		$	$
Nova Scotian owned real estate		$1,973,000	$4,391,000
F.F.&E.		1,000,000	600,000
CN owned land (see comment re Ground Rent)		242,000	-

Mr. Cherry on his cross-examination concerning some differences between Mr. Turner's revised projections for 1986 and the actual 1986 figures observed that "I think that at this particular point of time it would be useful for me to say that the discounted cash flow approach is an approach which, when used, is able to be criticized severely with hindsight".

Mr. Cherry also on cross-examination stated that "If I were starting from scratch in a situation as it is I would not have used the discounted cash flow approach, okay, because I prefer to use the income approach". He also stated that although he is familiar with the discounted cash flow method of valuation he hasn't used it very often.

Mr. Cherry on cross-examination agreed that his report (R-31) is not to be taken as expressing an opinion of the value of the Nova Scotian Hotel for this appeal but is rather a critique of Mr. Speed's report.

Denvert Levy, the Regional Director of Assessment for the Halifax City Assessment Region, was called by counsel for the Director. Mr. Levy has been employed in the assessment field in various capacities for 21 years and has been the Regional Director in Halifax for three years.

The Board accepted Mr. Levy as an expert witness qualified to give opinion evidence on the valuation of property for assessment purposes. Mr. Levy prepared an appraisal report for purposes of this appeal, filed as Exhibit R-4. He had previously prepared an appraisal for purposes of the hearing before the Regional Assessment Appeal Court. He was not the person who had initially assessed the subject property for the assessment years 1984 and 1985. Mr. Levy's covering letter dated February 25, 1987, to counsel for the Director states his opinion as to the market value for assessment purposes of the Hotel Nova Scotian as being $3,026,000.00 for 1984 and $3,359,000.00 for 1985. He testified that he wished to make corrections to those values to the effect that his value for 1984 was $2,637,600.00 and $2,864,500.00 for 1985.

Mr. Levy prepared Exhibit R-59 which he stated was an addition to his report. Exhibit R-59 was prepared during the course of the hearing before the Board after evidence had been adduced with respect to the tax rate and taxes on F.F.&E. He was asked on direct examination:

> "Q. Do you agree with the other witnesses that there was included in your value taxes on furniture, fixtures and equipment originally and that it ought to be changed?"

He replied:

> "A. Yes, there definitely has to be an adjustment made and with this R-59 I've accepted the method that Mr. Speed has come up with in dealing with taxes and this is a revaluation of the property dealing with that."

Mr. Levy stated that the figures shown on Exhibit R-59 are the "final values for the property in question". Exhibit R-59 shows $2,999,300.00 (rounded) as the "Total Value of Complex" for the 1984 assessment year. It shows $68,000.00 as the value of Lot A and $323,200.00 as the value for Lot B, these two lots being lands rented by the Hotel for parking purposes. Exhibit R-59 shows the "Total Value of Complex" for 1985 in the amount of $3,159,000.00 with the parking Lots A and B having the same value as for 1984.

Mr. Levy then stated that his covering letter dated February 25, 1987, should be further amended by changing the 1984 assessment value from $2,637,000.00 to $2,999,300.00 and the 1985 figure of $2,864,500.00 should be changed to $3,159,000.00.

Mr. Levy pointed out that the filed Assessment Roll for Lot B for the years 1984 and 1985 shows the amount of $340,800.00 and this figure was confirmed by the Regional Assessment Appeal Court. However, since the decision of the Regional Court (September 13, 1985) it was discovered that the assessment of Lot B was based on a lot area of 85,000 sq. ft. whereas Lot B was actually only 80,807 sq. ft. The reduction arose out of the fact that the C.N.R. as owner of Lot B reduced the size of the land leased to Revenue. The result of the reduced area of Lot B was that in Mr. Levy's opinion the assessed value of Lot B shall be $323,200.00 rather than $340,800.00.

Mr. Levy, although he is responsible for the valution of all properties in the City, had only previously valued one or two hotels in the City.

Mr. Levy indicated that he had employed the income approach to value in his appraisal of the subject property. He stated that he did not utilize either the market or cost approaches to value. He used a capitalized net income approach. He said he did not employ the D.C.F. method used by Mr. Turner as when the original valuations were prepared for the 1984 assessment year, the only complete data available was to December 31, 1982. His staff, therefore, only used 1982 data to prepare the 1984 assessments for the subject property. He said that although he now had data to the end of 1986 he felt that he "should look at information close to my base date, which is January, 1983". After reviewing data for 1981, 1982 and 1983 he said he felt that "the 1982 statements were reflective of a normal year for the Nova Scotian Hotel and consequently I have used all the actual income and expenses for 1982". He explained that the D.C.F. method of valuation is based on projections and it would be physically impossible for his staff to "do a discounted cash flow". He also stated that the D.C.F. method was more subjective than the method he employed. He stated that: "If I have hard fact information that I can use in basing my valuation on, I would much sooner and do use that information rather than looking at the future and projecting into the future". He said that neither he nor his assessors use the D.C.F. method for assessment purposes. He stated that "...every commercial property done on the income approach in the City of Halifax was based on December 31st, 1982 information, that was the information that was available". Mr. Levy considered that the D.C.F. method was appropriate for new hotels where data is not known.

Mr. Levy to some degree carried out a process of stabilizing his income and expense figures for his data. By looking at several years in the immediate past he was able to extract from the data for the most current year any abnormal receipts or expenses. He also looked at statements for other hotels to assist in his determination of what is abnormal. He pointed out that his final figures using his method of selecting data for one year (1982) produced a result not identical but similar to the result obtained by Mr. Speed using his stabilized data.

Mr. Levy looked at each expense and income item for 1982 to determine whether any item required an adjustment if it was out of line with a similar item for 1981 or 1983.

As a cost of steam Mr. Levy used the amount actually expended by the Hotel in 1982. He obtained the amount from the Hotel's financial statements. He said he did not adjust the amount even though it was later determined that the actual cost of steam in 1982 was incorrect due to a metering error which was not discovered until 1984. The amount expended in 1982 was less than it would have been had the error been detected in 1982.

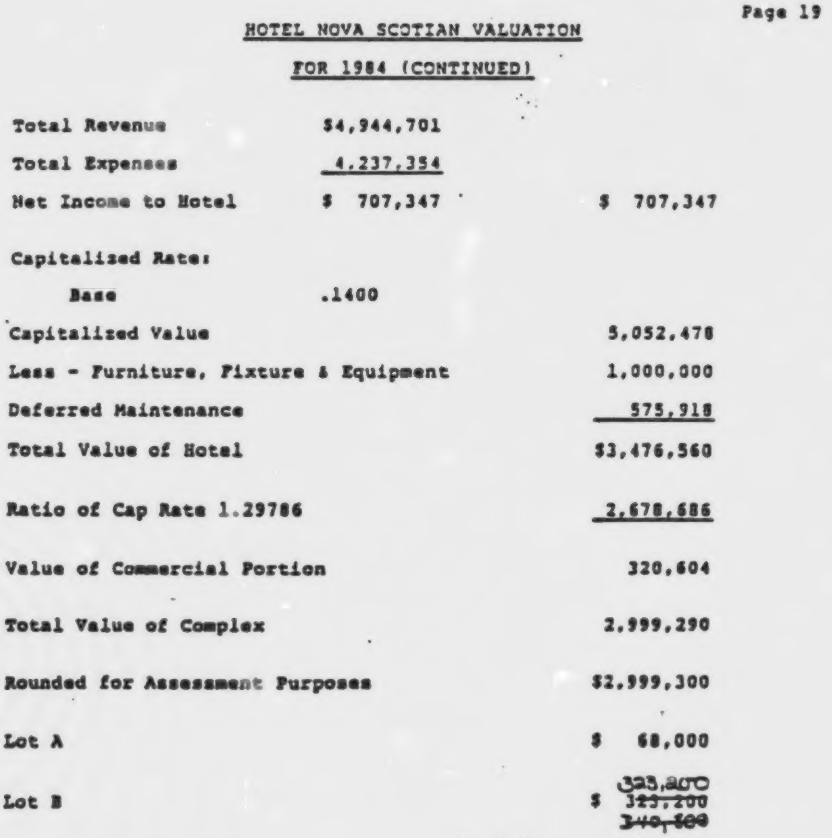
With respect to "deferred maintenance", Mr. Levy testified that this type of item had not been identified in his office prior to 1983 when he was preparing the 1984 assessments. He stated that this item first came to his attention while preparing for the 1984 Regional Court appeal. He referred to the item as descriptive of special repairs which were in addition to regular repairs and maintenance. He said his department made a deduction for deferred maintenance at the Regional Court appeal hearing. He said the deduction was made "as a lump sum value" from the bottom line.

Mr. Levy testified that at the time of the Regional Court hearing he discussed with a chartered accountant the manner in which accountants deal with deferred maintenance and capital improvements. He stated that his present method of dealing with these items is not the same as the method he used when he first prepared his report. He testified that: "Originally I had taken just the deferred items only and deducted it off the bottom line. Now, and with the change in my report, I have taken capital improvements and amortized those over the 20-year life period, that's an average life of those items, and deducted that as an expense".

Prior to this case Mr. Levy had not been faced with the question of how to deal with items of capital improvements and deferred maintenance in determining assessments of property.

Mr. Levy's final valuation for the 1984 assessment year is $2,999,000.00. He had put forward a value of $2,980,000.00 before the Regional Assessment Appeal Court. At the Regional Court hearing his final value for 1985 was the same figure as for 1984. His final valuation for the 1985 assessment year is $3,159,000.00 which arises out of the change in deferred maintenance. He pointed out that normally there is no change in the assessment value between reassessment years and the values "remain the same for a three-year period".

Exhibit R-59, prepared by Mr. Levy, shows in a summary form his valuations for 1984 and 1985 including the commercial area of the Hotel. The following is a copy of Exhibit R-59:



Page 19

HOTEL NOVA SCOTIAN VALUATION

FOR 1984 (CONTINUED)

Total Revenue	$4,944,701	
Total Expenses	4,237,354	
Net Income to Hotel	$ 707,347	$ 707,347
Capitalized Rate:		
Base	.1400	
Capitalized Value		5,052,478
Less - Furniture, Fixture & Equipment		1,000,000
Deferred Maintenance		575,918
Total Value of Hotel		$3,476,560
Ratio of Cap Rate 1.29786		2,678,686
Value of Commercial Portion		320,604
Total Value of Complex		2,999,290
Rounded for Assessment Purposes		$2,999,300
Lot A		$ 68,000
Lot B		323,800 $ ~~323,200~~ ~~340,800~~

Revised May 29,1987

HOTEL NOVA SCOTIAN

VALUATION OF COMMERCIAL AREA

Gross Rent	$ 77,492
Vacancy - Bad Debt 3%	2,324
Effective Gross	75,168
Expenses 26% of gross	19,543
Net Income	55,625
Capitalization Rate	
Base Rate .1400	397,321
Ratio of Cap Rate 1.23929	320,604
Value of Commercial Portion Rounded	$320,600

Revised May 29,1987

HOTEL NOVA SCOTIAN VALUATION

FOR 1985 (CONTINUED)

Total Revenue	$4,944,701	
Total Expenses	4,249,310	
Net Income to Hotel	$ 695,392	$ 695,391
Capitalized Rate:		
Base	.1400	
Capitalized Value		4,967,078
Less - Furniture, Fixture & Equipment		1,000,000
Deferred Maintenance		283,200
Total Value of Hotel		$3,683,878
Ratio of Cap Rate 1.29786		2,838,424
Value of Commercial Portion		320,604
Total Value of Complex		3,159,028
Rounded for Assessment Purposes		$3,159,000
Lot A		$ 68,000
Lot B		$ 323,200

Revised May 29,1987

Mr. Levy explained that Exhibit R-59 is "...a revaluation of the property and reflecting what actual taxes would be on the property". In response to a question from the Board as to what was reflected in Exhibit R-59, Mr. Levy replied:

> "Actual taxes if the value was what I arrived at. Originally in my report the net operating income had been capitalized with a 14 (%) cap rate plus an effective tax rate, effective tax rate being the 1982 tax rate times the level of assessment giving a rate of 18.17. Mr. Speed and I have used the identical rates. From that we then deducted our F.F.&E., and in doing this, I think it was Mr. Cherry, though his report, identified that we had too high a tax rate".

Mr. Levy said he agreed with Mr. Cherry on this point.

Mr. Levy testified that he had accepted the amount of $1 million as the value of the Hotel's F.F.&E. This amount was deducted by him from the capitalized value of the Hotel including the commercial portion. Since the purchase price of the Hotel in 1981 was $3.2 million, including the F.F.&E., the purchase price of the Hotel in 1981 was $2.2 million. Mr. Levy considered that his value for assessment purposes for 1984 of $2,999,300.00, which he said reflects a fair market value as of January, 1983, shows "a reasonable increase in value" since the time of purchase considering the amount that had been spent on the property in the interim.

An analysis of nine land sales in the vicinity of the subject property was prepared by Mr. Levy and filed as Exhibit R-

60. The value per sq. ft. was calculated for each sale and then this rate was adjusted for time. These sales took place between March of 1977 and December of 1984. The adjusted square foot sale price varied from $9.57 to $31.01. Mr. Levy concluded from these land sales that the front leased lot of the Hotel had a value of $10.00 a sq. ft. and the rear leased lands $4.00 a sq. ft. He, therefore, placed a value on Lot A of $68,000.00 rounded (6,803 sq. ft. x $10) and $323,200.00 rounded on Lot B (80,807 sq. ft. x $4).

On cross-examination by counsel for the City Mr. Levy agreed that the assessment value he was now suggesting of $2,999,300.00 for the Hotel for 1984 was approximately half of the original assessment prepared by Mr. Sam Farrell, presently the Regional Director of Assessment for the Colchester Region, who had prepared the assessments for all of the hotels in the City of Halifax. Mr. Levy agreed that he had reviewed with Mr. Farrell the 1984 assessments for all of the hotels in the City and had been at that time satisfied with the values placed on the hotels by Mr. Farrell. Mr. Levy was unable to state whether deferred maintenance had been allowed for in the process of assessing other older hotels in the City.

On cross-examination by counsel for Revenue, Mr. Levy was asked: "...does it make any difference to this appeal whether the Lord Nelson Hotel is rightly or wrongly assessed for 1984 and 1985?" He replied: "It makes no difference whether any of those hotels on that list (Exhibit R-29) are rightly or wrongly assessed for 1984 as concerns this appeal...". He replied: "No, it does not".

Mr. Levy expressed his understanding of the Assessment Act with respect to the uniformity of taxation that 1984 assessments should be uniform in relation to all properties in the City whereas the 1985 assessments for a commercial property must be uniform in relation to all commercial properties. He stated that the approximate assessment total in the City for all properties was $4.8 billion. He agreed that the total 1984 assessment of all hotels in the City would be "a very small percentage" of the total assessment. Although he couldn't recall the total of the commercial assessments for 1985, he thought it was over $1 billion and, therefore, the total assessment of the hotel and motel properties shown on Exhibit R-29 would be a very small percentage of the total commercial assessment. He agreed that if there were other properties in the City that had deferred maintenance that had not been taken into account in the assessment process that this would not make any difference to the proper assessment of the subject property.

Mr. Levy explained that after the appeal had been filed for the 1984 assessment year a review of the information given to the assessor on the questionnaire (Exhibit R-23) when compared to the financial statements of the Hotel showed that there were some errors in the questionnaire and this combined with the fact that the concept of deferred maintenance was unknown to the assessor produced a revised assessment figure substantially lower than the regional assessment prepared by Mr. Farrell.

On the matter of uniformity, Mr. Levy was asked on cross-examination the question: "...do I understand that your evidence is that your method produces a market value as of January 1, 1983?" He answered: "As at that base date, yes". He was then asked the further question: "And that it is uniform because it is market value as at the base date that all the other properties are assessed, and while they have moved into a different relationship to market value by the year 1984 your use of the earlier base date preserves uniformity"? He replied: "It is preserving it, yes".

Expert appraisal evidence was given by Arthur Speed, A.A.C.I. on behalf of Revenue. Mr. Speed's qualifications and experience are set out in Exhibit R-47. He was accepted by the Board as an expert witness qualified to give opinion evidence on the valuation of real estate. He has been an accredited appraiser since 1960 and has held many positions with the Appraisal Institute of Canada including that of National President in 1965. He has been involved in appraisal work for assessment purposes in the Halifax/Dartmouth Metropolitan area for over 20 years. He was retained about April of 1986 to prepare an appraisal report of the Notel Nova Scotian. He reviewed the documentation that had been submitted to the Regional Court and he reviewed the Court's decision. He met with the Manager of the Hotel and also with the Comptroller. He made a complete inspection of the hotel on three or four occasions. He reviewed the leases involving C.N.R.-owned lands used by the Hotel.

Mr. Speed determined that his approach to valuation was by way of the capitalization of a stabilized net operating income. He had financial statements of the hotel for "a portion of 1981 through 1985". He proceeded to prepare a stabilized operating statement of revenues and expenses and then capitalized the net operating income at 14%. He indicated that cap rates for hotels "are generally at the higher end of the range of investment property rates". Mr. Speed at the request of the Board defined "stabilized net income" as "a forecast of earnings based upon past and current trends, earning trends on a stable basis. Now by stable I mean that it ignores inflation and it tends to smooth out the aberrations that will occur from year to year in a normal operation". He said his appraisal figures are in constant dollars and are therefore not speculative which would be the case if he were to estimate the amount of future inflation.

Mr. Speed stated that in arriving at his valuation figures he subtracted F.F.&E. from his appraised market value since F.F.&E is not assessable. He also subtracted deferred maintenance which he "thought was essential for the continued maintenance of the earnings". He indicated that his figure for deferred maintenance included those items "which I considered to be absolutely essential such as repair to brickwork, repair to roofs and replacement of boilers, not replacement but the provision for boilers, carrying out of deferred maintenance to the rooms and the general decor of the hotel, bring it up to a competitive standard. And I made the subtractions for those amounts discounted to January 1, 1983, because I felt that a potential purchaser buying the hotel as of January 1, 1983 would take those things into account as a subtraction". He also said he "took out the taxes because the taxes are not known" and he "made an adjustment for the fact that the taxes had to be accounted for".

Mr. Speed identified Exhibit R-5 as an appraisal report he had prepared which indicates his opinion of the market value of the hotel property for assessment purposes for the years 1984 and 1985. He also identified Exhibit R-36 as a supplemental report he had prepared respecting his valuation of the F.F.&E. He said that after the preparation of his report he received a copy of the report prepared by Douglas Cherry which he reviewed. He then prepared Exhibit R-35 which contains some revisions to his original valuations. Exhibit R-35 includes a valuation as of December 31, 1982, by Mr. Speed of the leased parking lots owned by C.N.R. and revised pages 77 - 80 and page 62 of his original report. Subsequent to his preparation of Exhibit R-35 Mr. Speed prepared another revision filed as Exhibit R-48 which consists of revised pages 77 - 80 and page 62. He said that the Exhibit R-48 contains the revisions shown in Exhibit R-35 with the exception of the C.N.R. land valuations and some additional changes.

Mr. Speed testified that he recommended $64,000.00 as the value of the front parcel of land and $304,000.00 as the value of the rear portion as of December 31, 1982. Mr. Speed made the judgment call assumption that the front parcel of land is 2.5 times the value per square foot of the rear lands. Mr. Speed obtained a capitalized value of both C.N.R. parcels based on a 12% cap rate from the ground rents and then discounted this value to obtain a present value of the lands of $368,000.00 as shown in Exhibit R-35. He divided the total C.N.R. land value between the front and rear parcels as follows:

```
VALUE OF CN PARCELS                                          $368,000


ASSUME FRONT PARCEL 2.5 x
VALUE OF REAR PARCEL.


THEREFORE TOTAL EFFECTIVE AREA
    FRONT PARCEL 6,803 x 2.5 = 17,007 SQ. FT.
    REAR PARCEL  80,807 x 1  = 80,807 SQ. FT.
                               ---------- ---
                               97,817 SQ. FT.


FRONT LAND        $368.000 x  17,007                        ROUNDED
                  ---------- -------   =      $63,782         TO      $ 64,000
                        97, 817

                                                            BUSINESS
                                                            OCCUPANCY $ 16.000


REAR LAND         $368,000 x  80,807                        ROUNDED
                  ---------- -------   =      $304,006        TO      $304,000
                        97, 817

                                                            BUSINESS
                                                            OCCUPANCY $ 76.000
```

Mr. Speed said he recommended an assessment value of $2,682,800.00 for the hotel and the commercial realty for the 1984 year, $2,375,527.00 for the hotel realty and $307,295.00 for the commercial realty. These figures are shown on the revised page 80-A of Exhibit R-48, a copy of which is reproduced as follows:

VALUATION FOR 1984 ASSESSMENT

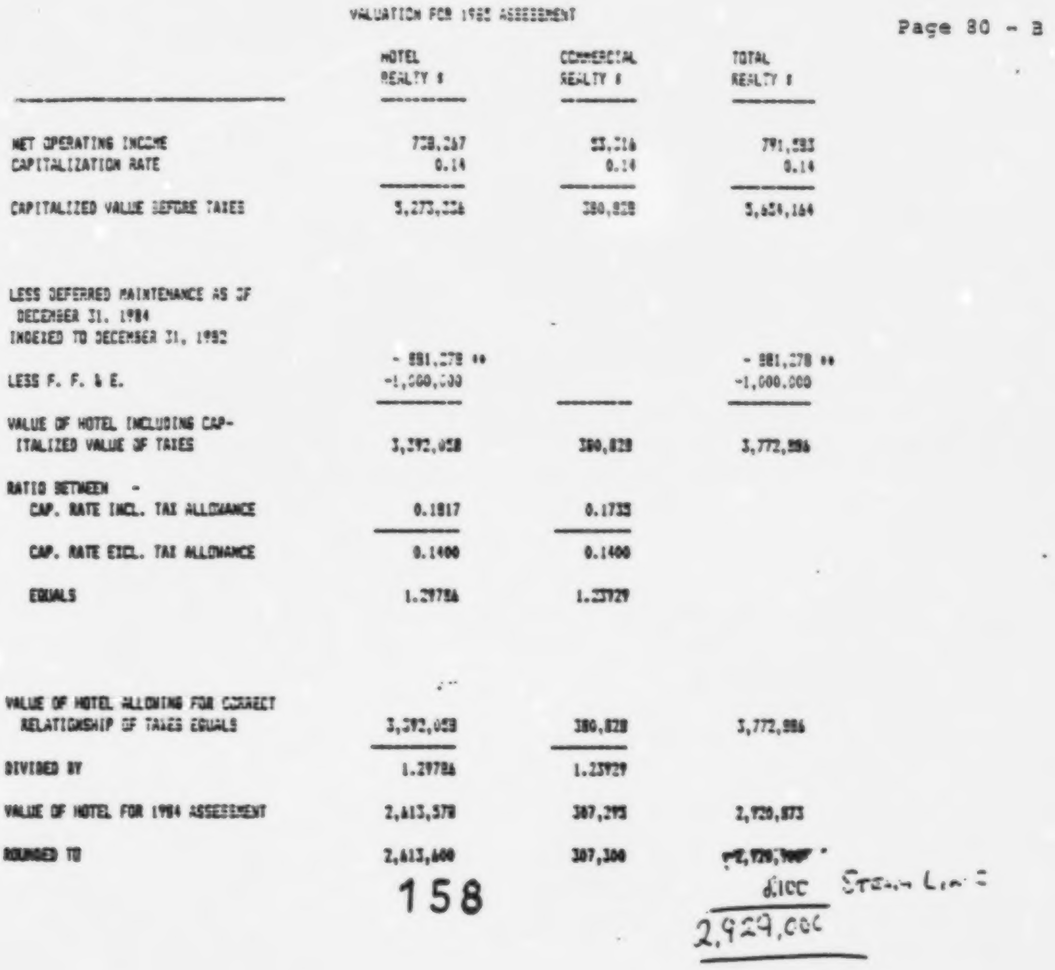
Page 80 - A

	HOTEL REALTY $	COMMERCIAL REALTY $	TOTAL REALTY $
NET OPERATING INCOME	738,267 **	53,316 **	791,583 **
CAPITALIZATION RATE	0.14	0.14	0.14
CAPITALIZED VALUE BEFORE TAXES	5,273,336	380,828	5,654,164
LESS DEFERRED MAINTENANCE AS OF DECEMBER 31, 1983 INDEXED TO DECEMBER 31, 1982	- 1,190,234 **		- 1,190,234 **
LESS F. F. & E.	-1,000,000		-1,000,000
VALUE OF HOTEL INCLUDING CAPITALIZED VALUE OF TAXES	3,083,102	380,828	3,463,930
RATIO BETWEEN - CAP. RATE INCL. TAX ALLOWANCE	0.1817	0.1733	
CAP. RATE EXCL. TAX ALLOWANCE	0.1400	0.1400	
EQUALS	1.29786	1.23929	
VALUE OF HOTEL ALLOWING FOR CORRECT RELATIONSHIP OF TAXES EQUALS	3,083,102	380,828	3,463,930
DIVIDED BY	1.29786	1.23929	
VALUE OF HOTEL FOR 1984 ASSESSMENT	2,375,527	307,295	2,682,822
ROUNDED TO	2,375,500	307,300	2,682,800
			8,161
			2,690,961

Steam Line

It is to be noted that the sum of $8,100.00 is added to the $2,682,800.00 shown on page 80-A. Mr. Speed on re-examination explained that he added $8,100.00 "because I've taken into account a steam line repair tht I later did not consider because I said it wouldn't have been necessary with the new boiler plant, so I just took it back out again". The $8,100.00 is shown on Exhibit R-51 and represents 1985 estimated steam line repairs of $11,850.00 factored to January 1, 1983 and adjusted for taxes. Thus Mr. Speed's final estimate of the hotel for the 1984 assessment year is in the amount of $2,690,900.00.

Mr. Speed's valuation figure for 1985 for total realty is in the amount of $2,920,900.00 as shown on his revised page 80-B of Exhibit R-48 a copy of which is reproduced as follows:



VALUATION FOR 1985 ASSESSMENT

Page 80 - B

	HOTEL REALTY $	COMMERCIAL REALTY $	TOTAL REALTY $
NET OPERATING INCOME	738,267	53,316	791,583
CAPITALIZATION RATE	0.14	0.14	0.14
CAPITALIZED VALUE BEFORE TAXES	5,273,336	380,828	5,654,164
LESS DEFERRED MAINTENANCE AS OF DECEMBER 31, 1984 INDEXED TO DECEMBER 31, 1983	- 881,278 **		- 881,278 **
LESS F. F. & E.	-1,000,000		-1,000,000
VALUE OF HOTEL INCLUDING CAPITALIZED VALUE OF TAXES	3,392,058	380,828	3,772,886
RATIO BETWEEN - CAP. RATE INCL. TAX ALLOWANCE	0.1817	0.1735	
CAP. RATE EXCL. TAX ALLOWANCE	0.1400	0.1400	
EQUALS	1.29786	1.23929	
VALUE OF HOTEL ALLOWING FOR CORRECT RELATIONSHIP OF TAXES EQUALS	3,392,058	380,828	3,772,886
DIVIDED BY	1.29786	1.23929	
VALUE OF HOTEL FOR 1984 ASSESSMENT	2,613,578	307,295	2,920,873
ROUNDED TO	2,613,600	307,300	2,920,900
			8,100 Steam Line
			2,929,000

Mr. Speed also adjusted his valuation estimate for the 1985 assessment year by adding the $8,100.00 for steam line repairs to the figure of $2,920,900.00 to arrive at a 1985 value of the hotel for assessment purposes in the amount of $2,929,000.00. There would appear to be a typographical error on the second last typed line from the bottom of page 80-B of R-48 where it reads "Value of Hotel For 1984 Assessment". This obviously should read "1985 Assessment".

It is noted that Mr. Speed in his original appraisal report (Exhibit R-5) included the value of the C.N.R. leased lands along with other assets used by the hotel in determining an aggregate valuation. He said he had included the value of the C.N.R. leased lands because he considered the hotel required the use of these lands to operate. Mr. Speed after studying Mr. Cherry's report prepared Exhibit R-35 which shows his valuation of the C.N.R. leased lands for assessment purposes. His reasons for doing this were that: (1) these lands are separately assessed, (2) this is a method of breaking out the value of the leased lands from the total valuation and (3) "partly as a result of reading over Mr. Cherry's report again and re-thinking my position on it I felt that this was a neater way of handling it".

Mr. Speed said that "In valuing the hotel separate and apart from the C.N.R. leased lands I put all of the revenue flowing to the owner of the C.N.R. land, which would be ground rent, into the C.N.R. pocket and all of the revenues and expenses associated therewith flowing from the parking into the hotel parking. So the hotel received the benefit of the parking revenues, they'd also had to pay all of the parking expenses including the taxes on the parking lots".

Mr. Speed stated that the appraisal business is not a scientific mathematical exercise but is a subjective matter. He also said that appraisal work is an art rather than a science. The Board agrees with Mr. Speed on this observation.

On cross-examination Mr. Speed agreed that there was nothing wrong with Mr. Levy's approach in using 1982 income and expenses after Mr. Levy had satisfied himself that the 1982 figures were "normal". Moreover, Mr. Speed said that Mr. Levy in using his method followed a "uniform approach thereto with other hotels". Mr. Speed observed that Mr. Levy "if he felt 1982 to be a normal year, which I can support from my own observations and my own tables, then there would be nothing wrong in him taking that actual year, and for assessment purposes if he was doing that with every hotel he's applying a uniform method". Mr. Speed added the comment that "uniformity in the Act doesn't mean uniform method but nevertheless it shows consistency".

Mr. Speed was asked on cross-examination by counsel for the Director this question:

> "So I take it Mr. Speed that you don't really disagree with Mr. Levy's method and use of '82 data providing that he exercised his judgment and determined it was normal, and providing it is normal, I know you don't agree with steam in particular, you don't really disagree with that method of using the actual expenses for assessment purposes in particular".

Mr. Speed's answer was:

"No, I don't".

Counsel for the Director read an extract from pages 277 and 278 of Mr. Rushmore's article (Exhibit R-17) to Mr. Speed. The first two sentences in this extract read as follows:

> "Where the possibility of litigation is present for property tax appraisals many disputes could be settled by using a Hotel's actual operating revenues and expenses for either the year prior to or subsequent to the date of valuation. As the previous examples demonstrate most hotels older than eight years are in the plateau or declining stages of their life cycle and the historic net income does not significantly understate what can be considered a stabilized level".

Mr. Speed acknowledged having read the complete article. He was then asked:

> "Q. And do you disagree with the comments made there to the effect that for property tax appraisal purposes disputes could be settled by using the actual and that I think the implication that this is a preferable method in this instance?"

Mr. Speed replied:

> "Yeah, taking page..., at the bottom of page 274 and over to 275 that you read, regarding the stabilization process, in conjunction with the extract that you read from pages 277, 278, I would agree with it".

At the conclusion of the hearing of the main evidence in this case, counsel for the City indicated she wished to adduce further evidence from Mr. Turner in order to make some changes in his valuation of the hotel property necessitated by the incorrect manner in which Mr. Turner had dealt with taxes and with interest expense in his original report. Counsel for Revenue agreed that Counsel for the City could file with the Board a letter or supplementary report from Mr. Turner which would correct his report with respect to the manner of dealing with taxes and the inclusion of an interest expense item of $17,000. This letter was to be circulated to counsel for Revenue and Counsel for the Director.

On September 15, 1987, the Board received a letter from Counsel for Revenue stating that he had "received reports from Ms. Donovan which go beyond that to which I agreed at the conclusion of the hearing. On behalf of the Respondent Revenue Hotels I must maintain the objection which was made to any further evidence from Mr. Turner which is not of a proper rebuttal nature". Counsel for the City had written to the Board on September 8, 1987, advising that on August 17, 1987, a supplementary report prepared by Mr. Turner was delivered to counsel for the Director and for Revenue. This letter stated that the Director had no objections to the admission of the report. This letter also pointed out that September 8, 1987, was the date set for the filing of post-hearing briefs. The letter stated that "without the supplementary reports, no final figures on assessed value can be presented as the original evidence contained incomplete calculations which the supplementary report completes and which are the subject of the objections to the supplementary report. The City would be pleased to attend for a resumption of Mr. Turner's evidence at the Board's convenience". The Clerk of the Board was instructed on September 10, 1987, to contact counsel for the parties and arrange a date for the resumption of the hearing.

On October 16, 1987, the hearing resumed. Mr. Miller objected to the Board hearing further evidence from Mr. Turner because this further evidence "is not rebuttal by any stretch of the imagination". Mr. Miller was agreeable however to hearing further evidence from Mr. Turner on two points only, one about taxes and the other about the inclusion of $17,000.00 for financing. Counsel for the Director indicated she had no objections to the hearing of further evidence from Mr. Turner. The Board agreed to hear further evidence from Mr. Turner in order that he might make some adjustments to his report. It was made clear by the Board that the Director and Revenue could call rebuttal evidence if they wished after Mr. Turner was heard.

Mr. Turner identified Exhibit R-61 as a letter dated July 2, 1987, he had sent to counsel for the City. He testified that the amount of $4,963,000.00 shown on page 4 of Exhibit R-61 reflects his opinion as to the hotel property's value for the 1984 assessment year. He testified that this figure "reflects all the changes with respect to the bank charges and also with respect to the effect of incorporating the $17,000.00 in the mortgage financing. It also reflects the under-billing by the Nova Scotia Power Corporation". He then deducted from the $4,962,920.00 (which is $4,963,000.00 rounded) the amount of $140,599.00 being his estimate of the pre-payment penalty and interest to pay out the hotel's mortgage. The calculation by Mr. Turner of the $140,599.00 figure is shown on Exhibit R-62 prepared by Mr. Escott. This results in Mr. Turner's amended 1984 assessment value of $4,822,321.00 and $5,019,699.00 for the

1985 assessment year. No further evidence was called by the parties.

This is undoubtedly a complex assessment case. Despite the fact that all these parties were in agreement that the income approach to value is the appropriate method to be used in this case the three appraisal experts, Mr. Turner, Mr. Levy and Mr. Speed, all came to different conclusions as to assessment value for the two years in question, 1984 and 1985. It is somewhat astounding that the original assessment for the hotel for both 1984 and 1985 was in the amount of $5,963,100.00 which amount is approximately twice the figures recommended by Mr. Levy at the hearing of these appeals. It is of course noted that Mr. Levy did not personally determine the original assessments. Mr. Levy's final figures for the hotel were $2,999,300.00 for 1984 and $3,159,000.00 for 1985.

Mr. Speed's final figures for the hotel were $2,690,000.00 for the 1984 assessment year and $2,929,000.00 for the 1985 assessment year. These figures are not materially different from those of Mr. Levy. Mr. Turner's final figures noted above are however considerably higher than those of Mr. Speed and Mr. Levy.

Mr. Levy made it clear that his Regional Assessment office is not geared up to the use of the D.C.F. method employed by Mr. Turner because it is a more time-consuming method and appears to require the utilization of a computer. Mr. Levy simply does not have sufficient staff to employ the D.C.F.

method.

The Board is indebted to counsel for the parties for the comprehensive post-hearing submissions filed with the Board.

There are several areas where the expert appraisers are in disagreement:

(1) Furniture, Fixtures and Equipment (F.F.&E.)

All the appraisal experts estimated the value of F.F.&E. which they agreed must be deducted from the capitalized value of the net income to arrive at hotel value for assessment purposes. F.F.&E. is not assessable property under the Assessment Act and therefore its value must be removed from the capitalized value of the net income. The valuation of F.F.&E. in an older hotel such as the Nova Scotian is not an easy task. Mr. Turner placed a value of $571,000.00 on the F.F.&E., whereas both Mr. Speed and Mr. Levy valued these assets at $1,000,000.00. The Board accepts the evidence of Mr. Speed and Mr. Levy that $1,000,000.00 is the proper value of the F.F.&E. In 1981 the C.N.R. and Revenue, dealing at arms length, agreed on a breakdown of the purchase price into land, buildings and "chattels, equipment and stock in circulation" in the total amount of $3,200,000.00 of which $1,000,000.00 was assigned to the chattels, equipment and stock in circulation. In the Board's opinion the figure of $1,000,000.00 reasonably represents the value of the F.F.&E. for the assessment years in question. Mr. Speed's report (Exhibit R-5) at page 65 states that "additions were made to F.F.&E. following the purchase and at December 31, 1983 and December 31, 1984 the undepreciated capital costs were $1,271,985.00 and $1,629,838.00 respectively. The corresponding depreciated capital costs were $963,644.00 and $1,173,380.00. This figure of $1,000,000.00 represents 22.4% of the capitalized value of the hotel before subtraction for deferred maintenance".

The City submitted that the $1,000,000.00 figure accepted by both Mr. Speed and Mr. Levy is "suspect" because:

> "(a) the figure was developed from a sale with a non taxpaying vendor;
>
> (b) the number has only one significant figure and is therefore immediately suspect;
>
> (c) the ratio of the F.F.&E. and total sale price in May 1981, is in excess of industry standards".

Mr. Turner's figure of $571,000.00 is 17.84% of the actual purchase price paid for the hotel in 1981 ($3,200,000.00).

It is obvious that if Mr. Turner's figure of $571,000.00 for the value of F.F.&E. is correct then Mr. Speed and Mr. Levy in deducting $1,000,000.00 from the capitalized value of the hotel would be deducting $429,000.00 ($1,000,000.00 - $571,000.00) too much and thereby undervaluing the hotel.

The Board accepts the evidence of Mr. Speed and Mr. Levy as to the value of the F.F.&E. because their evidence is based on the agreed breakdown of the total sale price in 1981 by the parties to an arms length sale. The Board accepts this evidence over the subjective opinion of Mr. Turner in lieu of cogent evidence indicating a diferent value.

(2) Income Approach to Valuation

While all the parties are in agreement that the income approach to valuation is the appropriate one to apply in this case each of the expert appraisers employed different variations of this methodology. Mr. Speed preferred to go through an analysis of all items of revenue and expense to determine what he considered to be "normal", rejecting items which in his view were unusually large or small and thereby determining what he describes as the normalized net income for each year to which he applies the appropriate cap rate to establish value. Where there is evidence of major changes from year to year in particular items of revenue and expense, this process of normalization has considerable merit and in my opinion would be the preferred method despite the fact that the appraiser must exercise some considerable judgment in determining what items are not normal. This method therefore seems to involve a degree of subjectivity in determining what is "normal".

Mr. Turner's D.C.F. method is also a variation of the income approach to value and in my judgment involves even more subjectivity than Mr. Speed's normalized approach. The D.C.F. method involves a process of trying to estimate net income over a period of years where the future income is projected from past performance. To some degree one needs a crystal ball to utilize this method despite the fact that the process has some recognized legitimacy. In this particular instance Mr. Turner's used a ten-year period and he projected a net income for 1986 considerably in excess of the actual net income achieved for that year and this in turn results in the net income for later years being over estimated and results in the net income being capitalized to be overstated. Mr. Turner's projection of total operating income for 1986 was $811,783.00 an over-estimation of $432,137.00. It is of course easy to criticize the D.C.F. method with hindsight.

In my opinion the process employed by Mr. Levy of using the actual net income derived from actual 1982 figures is not only expedient but also produces a satisfactory result. Based on his comparison of 1982 figures with figures for a portion of 1981 and actual figures for 1983 Mr. Levy had good reason to believe that the capitalization of the net income for 1982 would produce a proper valuation of the hotel. I am prepared basically to accept Mr. Levy's method producing the correct valuation. The fact that Mr. Levy's final figures of value are substantially in accord with those of Mr. Speed does not of iteslf mean that Mr. Turner's figures are incorrect but it does cast some doubt on the accuracy of Mr. Turner's D.C.F. method.

There is support for the Levy approach from the published writings of Stephen Rushmore, a well known qualified appraiser and author. Mr. Rushmore in his article entitled "The Valuation of Hotels and Motels for Assessment Purposes" published in The Appraisal Journal, April 1984 states at page 277 that "where the possibility of litigation is present for property tax appraisals, many disputes could be settled by using a hotel's actual operating revenues and expenses for either the year prior to or subsequent to the date of value". A copy of this article was filed as Exhibit R-17. Mr. Speed on cross-examination by counsel for the Director agreed with this comment by Rushmore.

(3) Steam Plant

A great deal of evidence was adduced as to what figure should be used for the cost of a steam plant in the process of determining the hotel's value as of December 1, 1983 and December 1, 1984. Mr. Levy once again simply used the actual cost incurred of $557,421.00 indexed to January 1, 1983, resulting in a figure of $464,845.00. The evidence indicates that the original "estimate" of the cost was $263,000.00. Mr. Turner used the estimate rounded up to $300,000.00. Mr. Speed used the same actual cost figure employed by Mr. Levy. Having determined that Mr. Levy's use of actual figures for 1982 is acceptable it appears reasonable to use the actual cost of the steam plant rather than the estimate of the cost.

(4) Deferred Maintenance and Capital Improvements

A great deal of evidence and argument related to the treatment of these items in employing the income approach to value. The evidence indicates that the original assessments for 1984 and 1985 did not take into account deferred maintenance. Mr. Rushmore in his text "Hotels, Motels and Restaurant Valuation and Market Studies 1983" at page 160 (Exhibit R-16) states that "The appraiser should consider the effects of deferred maintenance items by deducting the amount required to cure existing deficiencies from the final estimate of value".

Lincoln North, a well qualified appraiser and author in his text entitled "Real Estate Investment Analysis and Valuation" Second Edition states at page 97 (Exhibit R-57) that:

> "If an adequate maintenance program has been performed to date, then the historical trends in maintenance costs can serve as a reliable basis for forecasting future expenditures. If not, significant adjustments may have to be made in the preparation of a reconstructed statement of operations or, if the property has been seriously neglected, a lump-sum adjustment, representing the cost of curing the deficiency, may have to be charged against the estimate of market value for deferred maintenance".

It is clear from the evidence that an adequate maintenance program had not been carried out and the hotel property had been seriously neglected.

Mr. Levy properly estimated deferred maintenance outstanding as of December 1, 1983, and December 1, 1984, and deducted these amounts from his final estimates of value. He properly distinguished between deferred maintenance items and capital improvement items which a potential purchaser would consider necessary to maintain the hotel's income. He applied the actual costs incurred or estimated by Revenue and adjusted these costs to January 1, 1983 and amortized these costs over a twenty year period at 13% and the resulting figures of $155,770.00 for 1984 and $167,716 for 1985 were treated as expenses.

I agree with Mr. Levy's treatment of the capital improvement required for the construction of a staircase required by the Fire Department for Safety purposes. He allowed for this expense only for the 1985 assessment year as the necessity for this expenditure was not made known until late in 1984.

The evidence indicates that the hotel's air conditioning chiller was in very poor condition and repairs amounting to $57,812.57 were expended in 1982. The estimated cost of a new electric centrifugal chiller and its installation was $417,412.00 with an additional cost of $150,000.00 estimated to upgrade the electrical system. Mr. Speed in his report at page 40 states that "For the purpose of estimating market value we have chosen to consider that the existing chiller can be kept going, and we have not made a deduction from the final estimate of value for this item". He stated that he took the chiller into consideration in his estimate of a capitalization rate but he did not quantify the effect on the cap. rate.

Mr. Levy included $417,412.00 in his capital improvement items not incurred, together with $100,000.00 for new windows in the south wing, and $200,000.00 for new plumbing. He indexed these costs to January 1, 1983. (see p. 17A of the Levy report).

I accept Mr. Levy's method of dealing with capital improvements over Mr. Speed's and Mr. Turner's methods because it is clear, consistent and reasonable.

(5) Assessment Value for Lots "A" and "B"

Because the lands leased by Revenue are not owned by Revenue their value should not be included in the value of the hotel property and their value must be separately estimated. Mr. Speed's original report (Exhibit R-5) sets out a market value of the hotel property including the C.N. leased lands. Mr. Levy estimated the value of the two lots leased from the C.N.R. as follows:

> Lot A - 6803 square feet (front of Hotel)
> @ $10.00 = $68,000.00;
>
> Lot B - 80,807 square feet (back of Hotel)
> @ $4.00 = $323,200.00.

His basis for establishing his square foot values are set out in Exhibit R-60 wherein he analyses the sale of nine (9) properties all within a reasonable proximity of the subject site. He adjusted these sales for time only. His conclusions as stated in R-60 were that "a fair market value of the leased lands would be $10.00 per square foot for the front lot facing on Hollis Street" and "The $4.00 per square foot used on the back leased lot falls in line with land values established for other lands of Canadian National Railway and Ports Canada. These values were derived from capitalizing rents per square foot of leases at a rate of 12%".

It is to be noted that Mr. Levy valued Lot B as containing 80,807 square feet whereas originally this lot was leased to the hotel as containing 85,211 square feet. The area of the leased lot was reduced by the C.N.R. in 1982.

Mr. Speed's value for Lots A and B together was $368,000.00 which he obtained by capitalizing the ground rent due under the lease. He then apportioned $64,000.00 to Lot A and $304,000.00 to Lot B as has previously been noted on page 47 of this decision.

The City's appraisers did not give evidence as to the value of parcels A and B, although Mr. Escott did testify that in his opinion the 5.6 acres of land owned and leased by Revenue if vacant would have a value of $9.20 a square foot.

I accept the evidence of Mr. Levy on the value of lots A and B based on his analysis of actual land sales in the vicinity of the subject site.

(6) Percentage of Value to be Applied to the Assessed Value of Lots A and B to Determine Business Occupancy Under Section 7(2) of the Assessment Act.

Lots A and B are presently assessed for business occupancy assessment purposes at 25% of assessed value based on these lands being occupied or used for the purpose of a hotel under Section 7(2)(a)(iii) of the Assessment Act.

The Director submits that these lots "ought to be assessed for business occupancy at 50% of market value in accordance with S. 7(2)(c)" of the Assessment Act which states that business occupancy assessment shall be computed by reference to the assessed value of the property occupied or used in "a sum equal to fifty per centum of the assessed value for persons occupying or using property for a purpose not mentioned in or excluded from clauses (a) and (b)".

The Director submits that lots A and B are not owned by the hotel which is not really relevant since business occupancy assessment is based on the occupation or use of property. The Director submits that the use of these lands is a "commercial use in that C.N.R. is renting the property to Revenue Hotels

Limited". This is of course true but the issue is, what kind of a "commercial" use is in effect for these lands. If that commercial use is for purposes of a hotel then Section 7(2)(a)(iii) of the Assessment Act applies and the business occupancy assessment is fixed at 25% of the assessed value. The Director submits that neither Lot A nor Lot B are used for hotel purposes.

I disagree with this portion of the Director's submission and I find that on the evidence both Lots A and B are used for hotel purposes but not exclusively so. The major portion of the rear parking lot is used for hotel guest parking purposes and the front lot is partly used for transient guest parking and partly to provide access to the hotel itself.

I therefore find that 25% is the appropriate percentage for business occupancy assessment of Lots A and B.

With respect to the principal issues relating to these appeals set forth on pages 5 and 6 of this decision I offer these findings:

ISSUE NO. 1

The hotel and land owned by Revenue should be appraised and assessed separately from the Lots A and B owned by the C.N.R.

ISSUE NO. 2

The appropriate valuation approach in these appeals is the income approach. I agree with Rushmore who states at page 274 of Exhibit R-17 that: "...the income capitalization approach produces the most supportable value estimate and is generally given the greatest weight in the hotel valuation process".

ISSUE NO. 3

Deferred maintenance in this case, because the hotel property had been seriously neglected should be calculated and a lump-sum adjustment representing the cost of curing the deficiencies should be charged against what otherwise would be the estimate of market value.

ISSUE NO. 4

The necessity for the hotel to install its own steam plant was an absolute necessity because of the N.S. Power Corporation's decision to cease supplying steam to the hotel. Therefore, the actual cost of the construction of a suitable steam plant by the hotel owner should be treated as a capital improvement and amortized over its estimated life at an appropriate interest rate. The resulting yearly sum should then be deducted as an expense from gross revenues in determining value by the capitalization of net income.

ISSUE NO. 5

The appropriate method to determine the value of the hotel's F.F.&E. in this case is to adopt the value assigned to F.F.&E. by the parties to an arms length transaction in 1981 taking into account any additions to F.F.&E. in the interim and applying an acceptable amount of depreciation. The appropriate value for assessment purposes is $1,000,000.00.

ISSUE NO. 6

I accept Mr. Rushmore's observation on page 146 of

Exhibit R-12 quoted on page 25 of this decision that it is not proper to deduct anything from the stabilized income stream to remove the value attributed to the working capital component because "hotels typically have no working capital".

ISSUE NO. 7

The appropriate capitalization in this case is 14%. Both Mr. Speed and Mr. Levy used this figure. Mr. Turner "adopted a basic overall capitalization rate of 15% for the reversionary income stream at the end of the income projection period." An appropriate cap. rate is essential in the use of the income approach. What is appropriate in any given case is to a large measure a matter of professional opinion. The 15% figure selected by Mr. Turner is not necessarily wrong but I accept the evidence of Mr. Speed and Mr. Levy in this instance as being appropriate.

EVIDENCE BY DOUGLAS CHERRY

Some comment is required about Mr. Cherry's evidence. His qualifications as a chartered accountant are of the highest order and his expertise in the field of accounting is beyond question. He also is qualified for purposes of evaluating a business enterprise. His report (Exhibit R-31) and his evidence were largely directed to commenting on Mr. Speed's report and Mr. Speed's methodology. Mr. Cherry testified that basically he agreed with Mr. Speed's methodology and if he were doing an appraisal would have used Mr. Speed's method. He considered that the approach to value used by Mr. Speed "is probably appropriate and the information and financial data on which it is based generally appears to be sound and reasonable". He however made some substantial "adjustments" to the Speed Report as outlined in his own report, Exhibit R-31.

Mr. Cherry makes some valid observations especially with respect to the treatment by Mr. Speed of municipal taxes. Mr. Cherry correctly made an adjustment to the Speed report to "more appropriately deal with municipal tax expense by removing that factor from the capitalization process". Taxes are a function of the assessed value and the appraisal process is to calculate the proper amount of assessment value.

Mr. Cherry in his report very carefully stated that "we do not purport, in this report or otherwise, to express an opinion on the value of any of the physical assets of the Nova Scotian or its business". I therefore cannot rely on Mr. Cherry's evidence or report in materially assisting me in the difficult task of determining the appropriate valuations for assessment purposes of the hotel property.

DETERMINATION BY THE BOARD AS TO ASSESSMENTS:

Having considered all of the evidence, having read the written and oral submissions by counsel and having considered the relevant provisions of the Assessment Act as they apply to the 1984 and 1985 assessment years, the Board makes the following determinations:

(1) The commercial assessment for the hotel property for the 1984 assessment year is $2,999,300.00;

(2) The commercial assessment for the hotel property for the 1985 assessment year is $3,159,000.00;

(3) The business occupancy assessment for the hotel property for 1984 is $669,674.00 (calculated at 25% of $2,999,300.00 - $320,604.00 where $320,604.00 represents the value of the commercial portion of the hotel complex for 1984 as determined by Mr. Levy in Exhibit R-59);

(4) The business occupancy assessment for the hotel property for 1985 is $709,599.00 (calculated at 25% of $3,159,000.00 - $320,604.00, where $320,604.00 represents the value of the commercial portion of the hotel complex for 1985 as determined by Mr. Levy in Exhibit R-59);

(5) The commercial assessment for the Front Lot A for the 1984 assessment year is $68,000.00;

(6) The commercial assessment for the Front Lot A for the 1985 assessment year is $68,000.00;

(7) The commercial assessment for the Rear Lot B for the 1984 assessment year is $323,200.00;

(8) The commercial assessment for the Rear Lot B for the 1985 assessment year is $323,200.00;

(9) The Business Occupancy assessment for the Front Lot A for the 1984 assessment year is $17,000.00 (25% of $68,000.00);

(10) The Business Occupancy assessment for the Front Lot A for the 1985 assessment year is $17,000.00 (25% of $68,000.00);

(11) The Business Occupancy assessment for the Rear Lot B for the assessment year 1984 is $80,800.00 (25% of $323,200.00);

(12) The Business Occupancy assessment for the Rear Lot B for the 1985 assessment year is $80,800.00 (25% of $323,200.00).

COSTS

All three parties made submissions with respect to the awarding of costs. S. 22(1) of the Municipal Board Act, S.N.S. 1981, C. 9, states that "Except in respect of a proceeding pursuant to the Planning Act, the costs of and incidental to any proceeding before the Board shall be in the discretion of the Board, and may be fixed at a sum certain, or may be taxed".

The City points out that the hotel was originally assessed for $5,963,100.00 which was reduced to approximately one-half of this amount by the Regional Assessment Appeal Court based largely on the Director deducting a large sum for deferred maintenance "something he had never done before on this or on any other property". The City submits that "In that situation the City was forced to obtain its own appraisal and challenge the Regional Court figure...". The City also submits that it "has a duty to see that no taxpayer pays more than his fair share of taxes lest the taxation burden be transferred inequitably to other taxpayers. The City, as can be seen from the foregoing, is a victim of the changing assessment of the Director in the sense that because of the wide variances advanced by the Director the City was compelled out of a sense of fair play to other taxpayers to proceed with an appeal. Regardless of the decision in this matter it would be inappropriate that a victim be required to shoulder the burden of costs".

The City also contends that it was "required to enter the appeal because of the great variances in assessed values as originally established and then those suggested at the time of the appeal, the latter being almost patently offensive to reason, given its relationship to other hotel assessments in the City".

Revenue submitted that the "proceeding was initiated by the City appealing from the Assessment Appeal Court decision which the Assessor and the Hotel were prepared to accept. The City appealed the Hotel portion and did not appeal the rented lands. In order to have all matters before the Board, the Hotel filed appeals with respect to the rented lands".

Revenue further submits that: "In the event that this Board finds that the assessment for 1984 and 1985 should be less than or in the general range of the Assessment Appeal Court figure, it is submitted that the costs should be awarded in any event to the Respondents, the Hotel and the Director of Assessment. The appeal has been brought by the City. The parties have been put to great time and expense in answering the City's appeal. The City is seeking a fifty to sixty percent increase in the assessment over the Assessment Appeal Court level. The Respondents should receive their costs if the assessment is reduced from the Assessment Appeal Court decision or if there is only a minor or technical increase over that amount".

The main post hearing submission on behalf of the Director did not address the matter of costs. Counsel for the City did make a submission on costs in her Rebuttal to the City's Post Hearing Submission. The Director argues that "The City has the right, but no obligation, to appeal any assessment in the City of Halifax. The City chose to exercise its right in this case. It was not the City which was dragged through the longest assessment appeal in the history of Nova Scotia by the Director and the taxpayer, but the City who did the dragging.

The suggestion that the City ought to be awarded costs, should it not be successful in its appeal, is contrary to the principle of awarding costs to the successful litigant".

Counsel for the Director further submits that "If the City initiates litigation, it runs the same risk as any other litigant with respect to costs. The City is no uniformed (uninformed?), inexperienced litigant. If it turns out that the City is wrong in its opinion of value, and the Director and taxpayer right, a decision which did not award costs against the City would be completely unfair to the taxpayer and to the Director of Assessment.

In summary we take the strongest objection to the comment in paragraph 110 that regardless of the decision it would be inappropriate that a "victim" be required to shoulder the burden of costs. If there is any "victim" in this case, it is clearly not the City of Halifax".

I have given careful consideration to the submissions with regard to costs. I can appreciate the City's concern when it is faced with a Regional Court decision which has reduced by approximately one-half an assessment for the hotel of nearly $6,000,000.00 for both assessment years in question. If the City thought the original assessments were correct then the prudent thing to do would be to appeal. However, the City was under no obligation to appeal nor was it in any way "required" to appeal. It exercised its statutory right to appeal and as an informed and knowledgable participant in the appeal process must have been aware that if the appeal was not successful it would likely be faced with payment of the taxed costs of the appeal. Having opted for the appeal process and having failed in the process it seems only reasonable that the City should bear the costs incurred by the other parties.

Therefore in the exercise of the Board's discretion set forth in S. 22(1) of the Municipal Board Act, I determine that the Director and Revenue are entitled to their costs when taxed on a party and party basis on the County Court scale of costs.

Pursuant to s.s. (2) of S. 22 of the Municipal Board Act the Board orders that costs in these appeals shall be taxed by Arthur E. Hare, Q.C., of Halifax.

An Order will issue in accordance with this decision.

DATED at HALIFAX, Nova Scotia, this 27th day of May, A.D., 1988.

ROBERT H.N. BLOIS, Q.C.

Authorized to exercise the
jurisdiction of a member of the
Nova Scotia Municipal Board
pursuant to an Order-in-Council
made June 23, 1987.

NOVA SCOTIA MUNICIPAL BOARD.

STONEHEDGE DEVELOPMENTS LTD. ET AL v. DIRECTOR OF ASSESSMENT

ASSESSMENT - COMMERCIAL - INCOME APPROACH - VALUATIONS BASED ON CONDITIONS FOUND AT DATE OF ASSESSMENT - CAPITALIZATION RATE - CONDOMINIUM RENTAL INVESTMENT PROPERTY.

This is an appeal by S. Co. from a decision of the Halifax County Regional Assessment Appeal Court which raised the 1987 assessment from $2,807,000.00 for the whole property to $55,000.00 for each of 67 condominium units contained in two buildings built in 1986. No units are owner occupied. The rental arrangements are handled by S. Co., the rental income is pooled and distributed equally. There were certain income tax benefits included in the initial sale price of $79,000.00.

HELD: The Appeal is allowed and the market value for assessment purposes reduced to $2,807,000.00 to be divided equally among the owners at $41,900.00 each. No costs are awarded.

The format of the operation of the building is difficult to distinguish from the operation of other major syndicated rental investment properties developed under a joint venture or limited partnership method of ownership. The investors in this property have direct ownership of a condominium unit which entitles them to an equal, per unit interest in the operations as do investors in other types of property which are considered to be rental properties and valued on the income approach. Where a property is in existence at the date of assessment and there is sufficient information available upon which to calculate market value using the income approach, financial information from a subsequent period should not be used in the valuation calculation.

NSMB-3-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S., 1967, C. 14, by **STONEHEDGE DEVELOPMENTS LIMITED ET AL** from a decision of the Nova Scotia Regional Assessment Appeal Court, Halifax County Assessment Region made January 15, 1988, which allowed an appeal of the Director of Assessment and the Municipality of the County of Halifax which increased the assessment of the property located at 1021 to 1023 Cole Harbour Road, Halifax County, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: DAVID MILLER, LL.B., for the Appellant;

RANDALL R. DUPLAK, Q.C., for the Director of Assessment.

HEARING DATES: June 28, 29, 30, 1988.

DECISION DATE: August 3, 1988.

DECISION: Appeal Allowed.

DECISION

The Appellants are all individual owners of one or more of the 67 condominium units in Halifax County Condominium Corporation Number 116, located at 1021 - 1023 Cole Harbour Road, Cole Harbour, Halifax County, Nova Scotia.

The property is known as Woodbridge Court and is located in the Forest Hills area of Cole Harbour at the intersection of two major thoroughfares, Cole Harbour Road and Forest Hills Parkway. The area in which the property is located is a planned mix of apartment, condominium, residential and commercial development. The property consists of two buildings containing 35 units and 32 units respectively which are made up as follows:

	WOODBRIDGE #1	**WOODBRIDGE #2**
Basement 2-bedroom units	5	5
Regular 2-bedroom units	28	22
2-bedroom units with den	2	2
Deluxe units		3
	35	32

The subject property had originally been assessed using the income approach which had valued the property at the amount of $2,807,000.00 as at January 1, 1986. The Director of Assessment appealed this assessment to the Regional Assessment Appeal Court to assess ownership of each of the codominium units to the actual holders of the title and to have a value assessed to each one of the condominium units as opposed to the total property being assessed on the income approach. The Regional Assessment Appeal Court allowed the appeal and placed an assessed value of $55,000.00 on each of the condominium units each in the name of its individual owners.

The Appellants, Stonehedge Developments et al, are appealing the decision of the Regional Assessment Appeal Court, Halifax County Assessment Region in respect of the assessment year 1987.

The appeal requirements of the **Assessment Act** as to time and place of service of Notice of Appeal had been met to the satisfaction of the Board and the Board assumed jurisdiction to hear the appeal.

Counsel for the Appellant called four witnesses: Mr. Ian Logie who is a shareholder, officer and director of Stonehedge Developments Limited as well as an owner of one of the condominium units, Mr. Jeffery Clark who was responsible for the marketing of the units, Michael Foster who represented the company which carried out the property management on the subject property and Mrs. Gloria McCluskey an appraiser who had appraised the property.

Counsel for the Director presented two witnesses, Mr. William Salvona who testified as to the appropriate method of valuation for the subject property and Mr. James Amyotte who is the Senior Assessor for the Halifax County Assessment Region.

Mr. Ian Logie testified that the property known as Woodbridge Court was developed by Stonehedge Developments Limited which was a company incorporated approximately four years ago to develop real estate. Plans for the project were begun in 1984 and the property was found in 1985 in response to a tender call by the Nova Scotia Housing Commission which set the various terms for development. The developer intended from the very beginning that the project would be an investment property to be sold to individual investors on a income tax advantage basis.

In order to insure that the project could be sold a marketing expert was consulted and a marketing plan was adopted by the Company which included various rental and cash flow guarantees by the developer. This plan also included a provision that all the units be sold separately as individual condominium units with the intent that all the units be combined together and managed by a property management company as a 67-unit apartment building with the individual owners sharing equally in revenues and expenses (rental pool).

A document folder had been prepared by the appellant and entered as Exhibit S-8. Mr. Logie reviewed in detail certain aspects of this Exhibit which included the Woodbridge Court Investment Brochure, the agreement of purchase and sale with various guarantees, management and services agreements etc., a form of the rental lease, the Woodbridge Court Rental Brochure and copies of various advertising and signs for Woodbridge Court rental. Exhibit S-8 also included a tax opinion letter from Doane Raymond, Chartered Accountants and an operating statement for the year ended December 31, 1987.

Included on page 5 of the Woodbridge Court Investment Brochure was a Schedule setting out the allocation of the purchase price as follows:

"Building	$50,950.00
Land	7,675.00
Appliances and Fixtures	3,975.00
Initial service fees	16,400.00
TOTAL:	$79,000.00"

PAGE 6 PROVIDED A FURTHER DETAIL BREAKDOWN:

"INITIAL SERVICES FEES (SOFT COSTS)

SUMMARY

1.	Financing Services Fee (includes mortgage finders fee, appraisal fees, processing fees, brokerage fees and commitment fees)	$ 2,900.
2.	Marketing-Initial Leasing Fee (includes costs of developing and administering leasing program, costs associated with model suite, leasing personel, advertising, as well as interest costs from Completion of Construction.	1,950.
3.	Legal Fees (includes preparation of mortgage documents, condominium and management agreements, etc.	500.
4.	Rent-up Guarantee Fee (see enclosure)	1,925.
5.	Rental Management Guarantee Fee (see enclosure)	1,625.
6.	Landscaping	875.
7.	Mortgage Rate Guarantee Fee (see enclosure)	2,700.
8.	Cash Flow Guarantee (see enclosure)	3,003.
9.	Consulting and Structuring fees	922.
		$ 16,400.

NOTE:

a) The Developer will provide the above services and guarantees for the cost specified. The cost of these fees are incorporated in the purchase price of $79,000 per condominium.

b) All these Fees can be written-off against income from any source in the year incurred (1985) with the exception of Nos. 5, 8 and portion of 2 which must be written-off over 5 years (1986-1990).

c) The Investors must commit to purchase their condominium units before thes costs are incurred (i.e., before Commencement of Construction) to qualify for the tax write-off."

Mr. Logie testified that the above allocation was done on a best estimates basis to reflect the actual cost of an individual unit and that no attempt had been made to value the property any other way. He stated that the land and building figures per this allocation were the amounts used for the deed transfer tax. He also testified that any tax advantages for the property were included in the $79,000.00 per unit price and that 84% of these advantages would be recognized by an investor in the high income tax bracket in the 1985 and 1986 income taxation years.

Construction of the property commenced in the fall of 1985 and was completed by July, 1986, at which time Centennial Management Limited was engaged as property managers. Mr. Logie reviewed the difficulties experienced in renting the properties through the summer and fall of 1986 at which times rental rates had to be lowered and many incentives added to entice renters. Therefore the actual rental revenues and expenses experienced were significantly different from the projections included in the Investment Brochure.

The Developer had agreed to guarantee the projected rent for all units from the time of completion of construction to the obtaining of the first tenant as well as guaranteeing the cash flow for five years.

Although the cash flows were guaranteed for 5 years by the developer he pointed out that any advances under that guarantee were repayable by the investors at the end of the guarantee period.

Mr. Logie indicated that most of the investment units sold in 1985 and were registered in the fall of 1986 when condominium approval was received. All units had an initial tenant by March, 1987. There are no owner-occupied units contained in the project and because of the use of a property management company the advertisements and signage used to rent the units gave the appearance to the general public as representing a rental property and not the sale of condominium units.

Mr. Jeffery Clark is a real estate broker for J.R. Clark & Associates Limited and has been providing marketing consulting services since February, 1985. Mr. Clark testified that it was his advice to the developer that the project should be marketed through the sale of individual condominium units instead of the traditional syndicate approach of joint venture or limited partnership. The advantage of the sale of an individual condominium unit to the investor over the other methods is that the title would pass to the investor. This allows for greater flexibility to dispose of an interest in the case of financial hardship or estates. Such interests are not as easily disposed of in the case of joint ownerships.

Mr. Clark testified that the project was always intended from the very beginning to be a investment property for the rental of apartment units and that the proposal, including passage of title, and the various guarantees for initial rentals, cash flows etc., was put together as a marketing tool only and that there was never an intent for the units to be owner-occupied. He also indicated that the purchase price of a unit would not be justified at $79,000.00 without the income tax benefits to the higher income tax rate investors and that in all likelihood the project would not have been commenced if this higher selling price per unit was not available. He also indicated that there was a provision in all the agreements for the units to be owner-occupied and for the owner to opt out of the rental pool arrangement.

Mr. Michael Foster testified on behalf of the property managers, Centennial Management Limited. He indicated that he had been a property administrator for Woodbridge Court continuously since July, 1986. He reviewed the problems associated with the rental of the properties through the summer and fall of 1986 and which continued through 1987. He also reviewed various sections of Exhibit S-8 including projections included in the investment brochure, the lease format, the operating statement and the various advertising and signage used to rent the properties. He reviewed in considerable detail the various rents which were able to be achieved and the incentives which had to be offered in order to rent all of the units. All units had been leased at least once by March, 1987. However, the anticipated monthly rental of $650.00 was not achieved with the basement, standard and deluxe units all renting at different prices. Vacancy rates continued to remain high as people continued to move out of their apartments and new tenants had to be found.

He stated that as far as the property managers were concerned there was no difference in the management of Woodbridge Court on the rental pool basis than in the management of all other rental properties managed by his Company. Under cross-examination by Counsel for the Director, Mr. Foster agreed that the Management Statement included in Exhibit S-8 does not reflect the guarantees of the developer to the investors. He also indicated that as long as the cash is available to meet the commitments for the regular bills for the project the management company is not concerned about the source of the cash from which to pay the bills.

Mrs. Gloria McCluskey, formerly Director of Assessment for the City of Halifax and subsequently Deputy Director of Assessment for the Province of Nova Scotia, is currently in private practice as an assessment consultant. Mrs. McCluskey reviewed her appraisal report (Exhibit S-5) in considerable detail. She stated that in her opinion while the subject property is a registered condominium corporation it was constructed as a rental investment project and its value lies in its ability to generate income. Consequently, the valuation should be carried out on the basis of the income approach to valuation. In her opinion the highest and best use of the property at the time of assessment was as rental units as there was very little demand for condominium units in the subject area.

She stated she did not use the cost approach method of valuation because it does not necessarily reflect the true value. The project was built to be a rental investment property with various income tax advantages attached thereto. It must be valued without the income tax advantages and it could not have been built in the present manner if it were not a rental unit with income tax considerations attached thereto. She stated that in arriving at any final valuation for a property it is necessary to compare the results arrived at by the various methods of valuation. In her opinion, in this particular case, the market conditions have caused the property to have a value of less than its costs based on the income and cash flows it will produce.

She did not use the direct sales approach because in her opinion there was insufficient market data available in comparable areas to be reliable. In her view the few sales which were available in Colby Village, Forest Hills and Sackville areas were not sufficiently close to the subject property to be comparable.

Consequently, she used the income approach to valuation to value the subject property as a single unit which she says is the method most widely used in the valuation of income-producing properties.

Mrs. McCluskey based her calculation of net income on the actual figures shown by the December 31, 1987 financial statements provided by the property managers. She reviewed the adjustments she made to these figures which included a calculation of the base rent, based on the total number of units times the actual rentals charged on each unit, the adjustment of the vacancy rate to a norm for the area and sundry other adjustments to operating expenses.

She then reviewed the calculations of a capitalization rate which she used to apply to the net income. In doing so she reviewed a sales analysis of six sales of apartment units in the Metro area. Based on these sales she stated that she found a capitalization rate of 11% to be a proper rate to be considered in the valuation of the subject property. However, she actually used a capitalization rate of 10.5% in the valuation of the property. Her capitalization rate combined with the residential tax rate of 1.2% produced an overall capitalization rate of 11.7%. Mrs. McCluskey then proceeded to apply this rate to the net income and arrived at a value for the subject property. She then applied a general level of assessment of 92.5% to that value to arrive at a market value for assessment purposes at January 1, 1986. This general level of assessment is applied to ensure that taxation falls in a uniform manner upon all residential property in a town or municipality as required by the **Assessment Act**. As there was a different rental structure for each of the three types of units included in the complex, i.e. two-bedroom basement units, two-bedroom regular units and deluxe units, Mrs. McCluskey apportioned the total value to the individual units based on the rental levels of each unit. From this result she subtracted an allowance for appliances of $1,100.00 per unit arriving at the following results:

Basement Units	$34,800.00
Regular Units	$35,800.00
Deluxe Units	$37,900.00

In addition to the previous calculations, Mrs. McCluskey also did a valuation based on gross income multipliers. As shown by the sales analysis of the six other apartment units, gross rent multipliers ranged from 6.12 to 6.97. Mrs. McCluskey used a 6.2 multiplier in the valuation of the subject property. After applying the general level of assessment adjustment, the allocation to the individual units and subtraction of the allowance for appliances, the following estimates of value were arrived at:

Basement Units	$38,100.00
Regular Units	$39,200.00
Deluxe Units	$41,600.00

In arriving at her final estimate of value, Mrs. McCluskey combined the results of the gross income multiplier approach and capitalization of net income approach adding somewhat more weight to the gross income multiplier approach results and arrived at a final estimate of value of the following:

Basement Units	$37,100.00
Regular Units	$38,100.00
Deluxe Units	$40,500.00

Mr. William J. Salvona is a real estate appraiser for

Lincoln North & Company Limited of Toronto, Ontario. He testified that in his opinion the appropriate valuation method for the subject property is a valuation by use of the market comparison approach supported by the cost approach. This is detailed in his report, Exhibit S-4, to Mr. Duplak. He had not done a specific valuation of the subject property but discussed in general terms the various options and methodology used in the valuation procedures. He indicated the difficulty in arriving at comparable properties in this case as the characteristics of the subject property are totally different than most other situations. He further indicated that there is a different investment advantage to an investor in a condominium unit as opposed to a straight rental unit. He stated that ideally what was needed was an identical property for comparison purposes. For example one with a cap rate for a pooled income situation with cash guarantees. It was his opinion that, in theory, tax benefits would be used in the calculation but it is very difficult to qualify what the benefits of these would be to a unit at a particular time. Mr. Salvona was not aware of any situations in Ontario which were similar to the subject property. Under cross-examination he did agree that the income approach is the most reliable approach to valuation if one is valuing an income-producing property.

Mr. James P. Amyotte, Senior Assessor for the Halifax County Assessment Region, reviewed his report, Exhibit S-3, in some detail. He reviewed the three approaches to valuation included in his report. His use of the cost approach to valuation arrived at a value of $52,100.00 after applying the general level of assessment of 92.5%.

Mr. Amyotte did not use the income approach as in his opinion "the income approach is not considered for condominium units owned in fee simple by various owners within the same condominium corporation". In forming this opinion he relied on Section 28(B)(1) of the Assessment Act, R.S.N.S. 1967, Chapter 14, which states:

> "In a condominium corporation, each unit and the common interest pertaining thereto constitute a parcel for assessment purposes and the common elements do not constitute a separate parcel and shall not be separately assessed".

Mr. Amyotte then used a calculation using the market data approach to valuation. He stated that this property is the first of its style of construction to be developed in Forest Hills and therefore market data for similar properties in similar locations having similar characteristics was not available. However he felt that the sale of 62 units out of 67 units was in itself a market. Each of the units sold per the deed transfer tax information for a value of $58,625.00. After applying the general level of assessment this figure is reduced to a rounded value of $54,200.00 which in the opinion of Mr. Amyotte is the value for assessment purposes as of January 1, 1986.

Mr. Amyotte went on to indicate that to his understanding all the apartments were of the same square footage although the deluxe units may have more windows than others.

Those with an extra room were created by making the other rooms smaller. He did not use other prices of sales of condominiums in the area except as a test and a possible confirmation of the value he had arrived at. However, on closer examination he said any sales that he found were not comparable and would require too many adjustments to be of particular use. In cross-examination he agreed that it was ordinarily Departmental policy to assess all rental investment properties based on an income approach.

The issue before the Board in this appeal is very straightforward. Is Woodbridge Court considered to be a rental investment property for assessment purposes or not? The answer is not as straightforward. There is no question that each apartment unit is individually held in fee simple by various owners but does this in itself preclude the Board from considering the whole project as a rental investment property?

There is a preponderance of evidence presented during the hearing which indicates that Woodbridge Court was intended to be an investment vehicle from its very inception. It was conceived as a rental investment property, it was developed as a rental investment property, it was marketed as a rental investment property, it is managed as a rental investment property and it would appear that it was purchased as a rental investment property by the individual owners. Each unit was purchased at the same price by the investors. The property is managed as a rental pool with unit owners sharing equally (per unit) in revenue and expenses and all guarantees applying equally (per unit). There is a separate unit set aside in the developers name for the use of the superintendant of the buildings. None of the 67 units are owner-occupied. A listing of assessed owners provided in Mr. Amyotte's report shows that other than the developer (who is assessed for five units) there are 43 owners of individual units of which eleven own more than one unit. Although the agreements provide for the opportunity to opt out of the rental group, the evidence indicated that this clause was added to provide flexibility to the marketing plan. The advertising for the sale of the project to individual investors was quite different and distinct from the advertising and signage carried out by the property managers in order to rent the apartments.

On looking at the final format of the operations of Woodbridge Court the Board finds it difficult to distinguish it from the operations of other major syndicated rental investment properties which were developed under a joint venture or limited partnership method of ownership. In the final analysis, investors in the joint venture and limited partnership rental properties have a unit-share which entitles them to an equal, per unit, share with other investors in the total operation of the rental unit involved. Investors in Woodbridge Court have direct ownership of an individual condominium unit which entitles them to the same per unit interest in operations as investors in these other types of properties which, according to the evidence, are considered to be rental investment properties and are thus valued on the income approach to valuation.

Counsel for the Appellants referred the Board to a decision of the Supreme Court of British Columbia (Legge J.) in Queensplate Development Limited v. Assessor - Vancouver (1987) No. A863176 in which the Court upheld the Board ruling that the property should be valued in accordance with their use as rental property rather than by comparison to owner-occupied units which sold in other owner-occupied buildings in the same area.

A copy of this case was submitted to the Board by Counsel for the Appellants in a pre-hearing memorandum (Exhibit S-6). As pointed out in the memorandum and in the decision of the Nova Scotia Regional Assessment Appeal Court (Exhibit S-2) the facts related to this case are slightly different than those related to Woodbridge Court in that all the condominium units in the Queensplate Development Limited case were owned by the same owner (none had been sold). However, the arguments presented by Mr. Justice Legge do provide some useful insight into the Appellants' contention that the important consideration is based on the use to which condominium units reasonably are put and not as the Regional Assessment Appeal Court contended which was that none of the condominiums relating to the property under appeal had been sold and therefore there was no direct market information in the form of individual sales upon which to rely. In fact the Queensplate decision states on page 29 that:

> "The Board considered the assessor's evidence and the properties used as comparables by the assessor".

Mr. Amyotte seems to rely very heavily on the wording of Section 28(B)(1) of the **Assessment Act** in discarding the use of the income approach for valuation of the subject property. The Board does not see it this way. It would interpret Section 28(B)(1) to mean that all areas of a condominium corporation including common areas shall be assessed to the individual owners of each unit. The Board does not construe the meaning of this Section to provide any direction to the assessor as to the method of valuation to be used in calculating the value for assessment purposes.

The Board has carefully reviewed the testimony of Mr. Salvona. He appears to have based his opinion on his understanding of the multiplicity of ownership of the subject property. The Board feels that in this case the ownership is just a method of syndication used to market the property. Therefore the Board must discount his testimony relating to direct sales comparison and consider the income approach which he agreed was the most reliable approach when valuing rental investment properties. The Board feels that Mr. Salvona did not have a full understanding of all the facts concerning the subject property nor was he fully appraised of all the statutes and practices relating to assessments in Nova Scotia.

The Board is of the opinion that Woodbridge Court is a rental investment property and as such should be valued for assessment purposes using the income approach to valuation.

The Board is also of the opinion that this decision alone would not prevent the Department from continuing to assess rental properties of less than four units on another approach as feared by the Counsel for the Director.

Mr. Duplak referred to a Board decision Cummings v. Director of Assessment (1986) 5-A M.B.D. 26 (NSMB-101-84-A), concerning the Board's position regarding departmental policy of valuation of rental properties of three or less units using the income approach. On review of this decision it appears that the appropriateness of the use of the income approach was not decided in the case because of the lack of evidence of any income on which to base a valuation by the income approach. In that case, the Board was unable to make a determination.

The Board also disputes the sale price of $58,625.00 used by Mr. Amyotte in adopting the market approach. This is the value placed on land and building as part of the total offering price of $79,000.00. The Board feels that to take such a value in isolation, as the actual sale price is unreasonable. The components of the $79,000.00 per unit price paid by the investors cannot be considered in isolation but must be looked at in total. In order to use the market approach in this case, it is the Board's opinion that it would be necessary to obtain suitable sales comparisons outside the project or have some resales within. Such comparisons are not available. The original sales values of the individual units are too distorted by income tax considerations which, for the most part, no longer affect the present market value of the units.

Having decided that the income approach is the most appropriate method for valuation of the subject property, the Board must now address the other issues raised in connection with the valuation presented based on the income approach. The Board sees these to be the following:

1. The valuation by Mrs. McCluskey on the income approach was done effective December 1, 1987 and based on the actual figures for the year ending December 31, 1987. Is this an appropriate time frame to consider having regard to the levels of assessment as of January 1, 1986?

2. Given the cash flow and rental guarantees by the developer to the unit-holders, what are the appropriate figures to be used in arriving at net income to be capitalized?

3. What reliance can be placed on the sales analysis of the six comparable apartment unit sales and the capitalization rates derived therefrom?

4. Given that there are three basic different types of units and three different rental rates for each should all the units be assessed at the same value to the individual owners?

5. What weight, if any, should be given to the income tax consideration inherent in the project?

Before answering these questions the Board must determine whether or not it must accept the testimony of an expert witness which, although challenged by Counsel for the Appellants, was not contradicted by expert witnesses for the Director. There was no alternate expert evidence provided.

The very nature of an administrative Board and its assigned responsibilities indicates that there is assumed to be a certain level of expertise by its members which permits the members to assess the various opinions given by experts during the hearing and consequently form their own judgements.

In Halifax Developments Limited v. Director of Assessment (O'Hearn, C.J.J.) 55 N.S.R.(2d.) and 114 A.P.R., Justice O'Hearn states the following commencing at paragraph [183]:

> "... In dealing with, e.g., medical or engineering evidence no judge would be tempted to get too deeply involved in either field, and the valuation of real estate has, of recent decades, taken on some of the characteristics of these professions in that it now involves a great many technical approaches and procedures in addition to the basic experience, that is, at bottom its true foundation.
>
> [184] Nevertheless, property valuation is something that everyone is involved in to some extent. the special methods employed by appraisers, while not within the scope of the knowledge and education of ordinary people, are based on common experience and involve only elementary mathematical training. to that extent they are capable of appreciation and criticism by any reasonably informed person.
>
> [185] This is fortunate, because the case law requires a judge of the county court sitting on an assessment appeal to rehear the case and to come to his or her own conclusion as to the value. More recently, some of the higher courts pointed out that the decisions of a specialized tribunal such as the Court of Assessment Appeals are entitled to respect because of the special qualifications and experience of the members of the tribunal....".

The Board is of the opinion that, where warranted, it may adopt views which may not agree with the evidence given by expert witnesses. It must weigh all the evidence and then accept or reject the same.

1. As previously stated, Mrs. McCluskey did her valuation effective December 1, 1987, based on financial information for the year ended December 31, 1987. The issue before the Board is whether or not this is the appropriate point in time at which to carry out the valuation.

In Halifax Developments Limited v. Director of Assessment, when discussing the matter of the prudent investor at paragraph [22], Justice O'Hearn makes reference to a statement of Lord Parmoor in Great Western and Metropolitan Railway Companies v. Kensington Assessment Committee, [1916] 1 A.c. 23, at p. 54:

> "In the yearly valuation of a property for purposes of municipal assessment there is no room for hypothesis as regards the future of the property. The assessor should not look at past, or subsequent or potential values. His valuation must be based on conditions as he finds them at the date of the assessment. In particular, in the present case, there was no ground for considering any other condition, as no suggestion of any kind appears in the record that there was, throughout the period of assessment, a prospect of any change."

From this reference the Board forms the opinion that valuations must be based on conditions as found at the date of assessment. It is apparent from the evidence that in this case there was information available in December, 1986, which would allow a valuation to be carried out. This is evident from the fact that Mr. Kelly did, at that time, carry out a valuation based on the income approach which was obviously calculated using the best information available to him at that time. Evidence shows that discussions were held with the property manager and visits to the site were made.

Section 38(1) of the **Assessment Act**, R.S.N.S. 1967, c. 14, makes reference to "a sale in the open market by a willing seller to a willing buyer". In this case any seller - buyer would not have December, 1987, financial information available upon which to base a valuation and would have to rely on the best information available at that time.

Where a property is in existence at the date of assessment and there is sufficient information available upon which to calculate market value using the income approach, it is the opinion of the Board that financial information from a subsequent period should not be used in the valuation calculation.

2. During the testimony of the various witnesses throughout the hearing, Counsel for the Director made many references to the cash flow guarantees given by the developer to the investors in the property indicating that in his opinion the guaranteed figures should be the ones that would be used if an income approach were to be used in the valuation of the property. A review of the information provided indicates that although there is a cash guarantee for five years any amounts not repaid from operations at the end of that period are due and payable by the investors at that time. Therefore the Board is of the opinion that the cash flow guarantees are in the form of a deferred of payment and should operations not improve to the extent required the investor is fully liable for advances paid by the developer. Therefore, it is appropriate to use the levels

of rentals and expenditures experienced at December, 1986 without giving consideration to the cash flow guarantees.

This approach is supported by the decision of the Supreme Court, Appeal Division, in Director of Assessment v. Urban Properties (1982), 51 N.S.R.(2d.) 382. This decision upheld a decision of the Nova Scotia County Court which had excluded rent subsidies from Central Mortgage and Housing made in the form of interest deferred loans to developers, from being considered income for purposes of valuation of apartment buildings by the income method. At paragraph 29 it states in part:

> "...the loan by the government to make the property theoretically economically viable should not be considered as part of the rent in the calculation for assessment purposes."

The Board is of the opinion that the cash flow guarantee provided to the investors in the case of Woodbridge Court is similar in nature and intent to the rental guarantee provided by C.M.H.C. referred to above.

3. During cross-examination of Mrs. McCluskey, Counsel for the Director spent considerable time reviewing the six comparisons used for the sales analysis in developing capitalization rate and gross income multipliers. The sales one to four were considerably smaller properties with units ranging from 12 to 23. All four were much older buildings and were located in areas some distances away and thus not directly comparable to the subject property in Forest Hills. Sale number 5 had 48 units and it was indicated to have been sold under a

receivership sale. Sale number 6 with 96 units showed a sale price of $4,000,000.00. It was stated that the Deed Transfer Tax was for $4,520,000.00. Properties from one to five are subject to rent control with property number six coming into rent control in 1988.

The Board shares some of these concerns as to the validity of these comparisons in developing a capitalization rate and gross income multipliers. The Board notes the fact that the subject property is a new property, just in the initial stages of operations, at assessment time and points out that a potential investor might be prepared to accept a somewhat smaller rate of return in the initial years for the potential growth in the future. Mrs. McCluskey has reduced her initial calculation from 11% to 10.5% to give some recognition of this fact. The Board is unable to determine if this is a sufficient reduction or not as it has not been offered any other evidence as to a possible capitalization rate which could be considered to be used for this property. The Board has not been able to derive an alternate capitalization rate from any of the evidence before it.

4. Mrs. McCluskey in doing her valuation came up with a different value for each of the three types of units based on the fact that there were different rents charged for each. The Board in determining that the property is a rental investment property has treated each investor as having invested an equal amount of money in the project for which he has received ownership of a condominium unit. Each investor is to share

equally in the operations of the property and the indications are that each unit costs approximately the same amount to construct. The Board is of the opinion that until such time as an investor should opt out of the rental pool and become an owner occupier, all units should be separately assessed, each at the same value.

5. The Board has given some consideration to the effect on the valuation of the property of the various income tax considerations inherent in the project. Evidence was presented during the hearing and again unrefuted that approximately 84% of the tax advantages available to the investors would be used in the first two years, i.e. 1985 and 1986. It is undeniable that a premium was paid by the investor for the ability to write off the so-called soft costs for tax purposes. It is obvious that should any resale of a unit occur, and none have to the date of the hearing, there would be little or no income tax advantages to pass on to a potential purchaser. It would be very difficult to quantify the income tax benefits still attached to these units. To give appropriate value, if any, to an income tax advantage it must be calculated based on the individual circumstances of each of the investors. In light of this, the Board is of the opinion that there should be no allowance given in the valuation calculations for possible income tax advantages at December, 1986.

In reviewing the Exhibits entered during the hearing the Board has noted that the decision of the Regional Assessment Appeal Court and thus the Notice of Appeal contain a different listing of assessed owners than the listing provided by Mr. Amyotte as on page 2 of his report. The main difference in Mr. Amyotte's listing is that seventeen units are now listed as being assessed in the names of individual owners and not Stonehedge Developments Limited. The appeal listing included 66 units while Mr. Amyotte's had 67 units listed. The Board assumes this difference to be the superintendant's apartment held in the name of Stonehedge Developments Limited. In this decision and order the Board will accept the listing as provided by Mr. Amyotte as he would have the greater access to the names of the actual assessed owners of the units.

In this instance, the Board is not prepared to accept Mrs. McCluskey's valuation for Woodbridge Court which in the aggregate totalled $2,259,500.00 mainly based on the fact that sufficient information was available in 1986 upon which to base an appraisal. Because of this, the Board is prepared to accept the valuation of Mr. Kelly in the amount of $2,807,000.00 which was the original amount of the assessment for Woodbridge Court.
Through conversations with the property managers and visits to the site, this assessor had full access to all the relevant information available in December, 1986, in order to make an informed assessment. Neither Counsel for the Appellants nor Counsel for the Director have refuted this figure although the Appellants have offered an alternative figure through the testimony of Mrs. McCluskey which the Board has already discounted to some extent.

In summary, the Board finds that Woodbridge Court is an investment rental property and as such should be valued using the income approach method of valuation. The Board has accepted the value for the property as a whole as originally assessed by the Department in the amount of $2,807,000.00, which is to be divided equally among the registered owners of the 67 individual units and each assessed accordingly at $41,900.00.

Neither counsel had asked for costs relating to this hearing. Recognizing that both parties experienced costs for expert witnesses, and further recognizing that the Board has determined a value between the two parties, no costs will be awarded to either party in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of August, A.D., 1988.

Michael G Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

SILVER v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION - FAILURE TO SERVE IN ACCORDANCE WITH STATUTE - ASSESSMENT ACT S.S. 100(1).

This is an appeal by S from a decision of the Lunenburg Regional Assessment Appeal Court which confirmed a change of use assessment. Notice of Appeal was filed with the Board after the 30-day appeal period had elapsed. Neither the Regional Director of Assessment, the Provincial Director of Assessment or the Municipal Clerk were served with the Notice of Appeal.

HELD: Appeal dismissed. No costs awarded.

The Board has no jurisdiction to hear facts relating to an appeal when the appropriate parties are not served with a Notice of Appeal. See MacKinnon v. Director of Assessment (1983) 2 M.B.D. 151; Spiropoulos v. Director of Assessment 1983 2 M.B.D. 174 and Berzins v. Director of Assessment 1987, 6 M.B.D. 3.

NSMB-9-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, C. 14, by **AUBREY SILVER**, from a decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region, which dismissed an appeal concerning a change in use assessment relating to approximately 1.5 acres of land located in Lower Northfield, Lunenburg County, Nova Scotia.

BEFORE: MICHAEL JOHNSON, C.A., Chairman.

COUNSEL: AUBREY SILVER, Appellant, on his own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: September 13, 1988.

DECISION DATE: September 30, 1988.

DECISION: Appeal Dismissed.

DECISION

The Board held a jurisdictional hearing on September 13, 1988, in the Council Chambers of the Municipality of the District of Lunenburg.

Mr. Duplak on behalf of the Director of Assessment entered three Affidavits. One was sworn by David E. Steele, Municipal Clerk for the Municipality of the District of Lunenburg. Another was sworn by Mr. Geary W. Romkey, Regional Director of Assessment for the Lunenburg Assessment Region. Mr.

Robert F. Warren, Provincial Director of Assessment swore the third. All stated that none had received copies of a Notice of Appeal from Mr. Aubrey Silver, the Appellant.

Doreen Friis, Clerk of the Board also swore an Affidavit. She stated that the Board received Aubrey Silver's letter of June 29, 1988, advising of his assessment appeal on July 12, 1988.

Mr. Silver's stated that he had received a copy of the Regional Assessment Appeal Court June 3, 1988, decision on June 6th or 9th, 1988. He consulted with the Municipal Clerk and the Solicitor for the Municipality. He then decided that he would appeal the decision of the Regional Assessment Appeal Court. The Notice was mailed June 29, 1988. He blamed the Post Office for the delay in delivering his letter.

Mr. Silver admitted that he had not served the Notice of Appeal on the Municipal Clerk nor had he served the Director or the Regional Director of Assessment. He stated that neither the Municipal Clerk nor the Municipal Solicitor informed him of the need for such further service of notice. He said he should not be penalized for his failure to serve notices of appeal on all the appropriate persons.

Section 100(1) of the Assessment Act, R.S.N.S., 1967, C. 14, states as follows:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the clerk of the municipality or town in which the property is situate,

> the Director, the person in whose name the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The Board strictly follows this Section relating to the timing of service of Notices of Appeal and upon whom the notices are to be served. (See cases, Allan MacKinnon v. Director of Assessment, 1983, 2 MBD 151; Arthur Spiropoulos v. Director of Assessment, 1983, 2 MBD 174 and Ilze Berzins (New Art Space) v. Director of Assessment (unreported) NSMB-143-87-A.)

Attached to Mr. Silver's letter dated June 29, 1988, were photocopies of the decision of the Regional Assessment Appeal Court. Also attached was other information which included a three-page document titled "Information Respecting Appeals From The Decisions Of The Regional Assessment Appeal Court". This information spelled out very carefully, those persons one must serve with a Notice of Appeal. Certain addresses were also provided. Mr. Silver only had to read the information provided to him to determine the appropriate procedures to file a Notice of Appeal.

Since the evidence clearly shows that the parties were not served with a Notice of Appeal as required by the Assessment Act, the Board determines that it does not have jurisdiction to hear the facts relating to the appeal and dismisses the appeal.

Neither party raised the question of costs during the hearing. The Board heard jurisdictional arguments only. For such a brief hearing the Board awards no costs.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this **30th** day of September, A.D., 1988.

MICHAEL JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

GILLARD v. DIRECTOR OF ASSESSMENT

ASSESSMENT - RESIDENTIAL - UNSIGHTLY PREMISES - LAND VALUATION- DECLINING MARKET VALUES - ASSESSMENT ACT SS. 38(1).

This is an appeal by S.G. from a decision of the Cape Breton Regional Assessment Appeal Court which reduced an assessment from $57,800.00 to $50,300.00 on a single family dwelling located in a residential area approximately one mile from a downtown shopping area. Market values in the Town were declining. There were unsightly premises located near the property. The Assessor had attempted to value the land by the application of a front foot value to all sides of the property which abutted town streets.

HELD: The appeal is dismissed. Declining market values cannot be considered past the date prescribed by the Director of Assessment. The application of a front foot value in calculating land valuations should be applied to the side and the land which best describes its shape and size. Unsightly premises located nearby were allowed for in the Regional Court's calculation. No costs were awarded.

NSMB-162-87-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, C. 14, R.S.N.S., 1967, as amended, by **STEPHEN GILLARD** from the decision of the Cape Breton Regional Assessment Appeal Court dated September 10, 1987, which decision reduced the assessment of property located at 10 Coldwell Street, Glace Bay from $57,500.00 to $50,300.00.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: STEPHEN GILLARD, Appellant, acting on his own behalf;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: October 19, 1988.

DECISION DATE: November 3, 1988.

DECISION: Appeal Dismissed.

DECISION

This is an appeal against the decision of the Cape Breton Regional Assessment Appeal Court which reduced the 1987 assessment of property located on 10 Coldwell Street, Glace Bay, from $57,500.00 to $50,300.00. The Appellant feels that further reduction is warranted.

The subject property is located on Coldwell Street, approximately one mile from the downtown shopping area. The area is serviced by sewer, water, garbage collection, fire protection, police protection and snow removal. The lot is roughly rectangular in shape with an average width of 70 feet and an average depth of 140 feet. Attached to this is a rectangular piece of land approximately 16 feet by 18 feet which fronts on Coldwell Street and contains the driveway and services for the property. There is a 7 foot right-of-way adjacent to this driveway. The house located on the lot is a single family three-bedroom bungalow with a gross floor area of 1,200 square feet. The house is ten years old and contains one and a half baths. There is also a 24 foot by 24 foot garage on the property.

The neighbouring property on the northwestern boundary of the property has been in unsightly disarray for a number of years. It contains such items as old oil tanks, above and below ground gas storage tanks, old cars and trucks not in running order, tangled wrought iron and many other items of an unsightly and possibly an unsafe nature.

The Notice of Appeal was served in the appropriate time frame and on the appropriate people. Having noted this, the Board assumed jurisdiction to hear the appeal.

Stephen Gillard gave evidence on his own behalf and Lloyd MacLeod, assessor for the Cape Breton Assessment Region gave evidence on behalf of the Director. There were no other witnesses.

During his testimony, Mr. Gillard made extensive reference to the valuation report (Exhibit G-2) prepared for the hearing by Mr. MacLeod. Mr. Gillard was particularly concerned about the calculation of land values. This calculation used an average cost per front foot of $80.00. The Appellant claimed that he only had approximately 15 feet fronting on Coldwell Street which was Town property. The 70 foot back line of the property was next to a lane which is not owned by the Town. Mr. Gillard reviewed the five properties which Mr. MacLeod used in his report to prepare his calculations for the market data approach to valuation. Mr. Gillard presented the Board with copies of Nova Scotia Real Estate Association listing forms. These listing agreements showed five other properties listed between April 6, 1987 and November 18, 1987. He compared their assessment values to asking price and sales price.

Mr. Gillard introduced a number of photographs showing evidence of the unsightly premises located near and around his residence. He also included two articles from the Cape Breton Post which indicated the Town of Glace Bay was having an overall problem with unsightly properties. He stated that the 10% allowance provided by Mr. MacLeod in his calculations for unsightly premises was insufficient.

Mr. Gillard also stated that he felt the 10% physical depreciation allowed by Mr. MacLeod was not enough. He did not take into account the leaking problem being experienced by his plastic sliding windows and patio doors.

In Mr. Gillard's opinion, the 1986 assessment of $41,900.00 would be a fair value to assess his house until such time as the Council for the Town of Glace Bay was able to solve the unsightly premises problem existing in the whole Town.

Lloyd MacLeod then gave evidence on behalf of the Director of Assessment. Mr. MacLeod was accepted by the Board as an expert witness qualified to give opinion evidence in assessment matters. Mr. Gillard objected to this. He stated that many of the procedures used by Mr. MacLeod do not necessarily apply to the Town of Glace Bay.

Mr. MacLeod reviewed his report (Exhibit G-2) in some detail. He reviewed the method used in the calculation of a value for assessment purposes by using the cost approach. He noted the various comparables he used in developing a value for land using six comparable properties. He went over the adjustments applied to the various portions of land and explained how he arrived at a market value of $80.00 a front foot.

The calculation of the lot value using this $80.00 per front foot is as shown in the valuation report on page 194. A review of this page indicates that this $80.00 a front foot was not only applied to the back 70 feet of property but also to the 16-foot driveway on Coldwell Street and to 7-foot right-of-way.

Mr. MacLeod then reviewed his formula in developing the reproduction costs of the buildings located on the land. He stated that he had applied a 10% physical depreciation factor. As well he used a 10% economic obsolescence which is applied to all properties in that area of Glace Bay. In addition, he stated that he had applied a further 10% locational obsolescence to account for the unsightly premises of the neighbouring properties. The results of these calculations show that the market value of the subject property by the cost approach was $57,000.00.

Mr. MacLeod stated that he and the Assessment Department had reviewed the sales of residential property in the Town of Glace Bay for the six months prior to and subsequent to the date of assessment. They had determined that, on the average, properties had sold at 2% below their assessed value in this time period. Consequently, he applied a general level of assessment of 102% in arriving at the $57,000.00 amount.

Mr. MacLeod then proceeded to review the five comparable properties which he had used in determining a value by the market data approach. He reviewed the adjustments applied to each of the properties in arriving at a final comparable valuation. He also stated that he had applied the 10% location obsolescence factor in arriving at the final value. As in the cost calculation this factor allowed for the unsightly premises of the neighbouring properties. He arrived at a value of $52,400.00 by using this approach which he stated was his final estimate of value for the subject property.

Mr. MacLeod stated that he felt that the 10% location obsolescence factor used in his calculations was adequate. Normally in similar situations in the Town of Glace Bay, a 5% factor is used. Because of Mr. Gillard's concern relating to his neighbouring properties, Mr. MacLeod had increased this to 10%. He was aware that the Regional Assessment Appeal Court had allowed a somewhat higher percentage (approximately 12 1/2%).

The Board notes many of Mr. Gillard's concerns relating to the calculations of Mr. MacLeod in arriving at his final valuations and makes the following observations:

In valuing land the Board would not apply the $80.00 a front foot to two sides of a property. The Board would also apply the $80.00 a front foot to more than just the 16 foot frontage of the driveway. A property owner should not receive a benefit or a penalty just because of the peculiar shape of his lot of land. The Board does not find fault with the assessor's application of the $80.00 a front foot to the 70 foot width along the lane at the rear, which is the average width of the property. The Board only questions the inclusion of the 16-foot driveway and the 7-foot right-of-way into the calculation as well.

Mr. Gillard stated that he did not believe the 10% physical depreciation used was sufficient to allow for the problem with his leaking windows and sliding doors. He had estimated that the repair costs for these items would be $6,000.00. He did not offer any evidence of repair estimates from a contractor to substantiate this figure.

Mr. Gillard also felt that the 10% location obsolescence used by the assessor and the 12 1/2% factor used by the Regional Assessment Appeal Court were insufficient to allow for the unsightly condition of his neighbouring premises.

The Board did a rough re-calculation of the assessor's valuation of the subject property by the cost approach. This calculation allows for curable physical depreciation in the amount of $3,000.00 (1/2 of the $6,000.00 amount requested). It removes the calculation of foot frontage for the small areas fronting on Coldwell Road from the value of land. It also allows a calculation of 12 1/2% location obsolescence. With these adjustments the subject property would have a market value using the cost approach of approximately $51,800.00. The Board is not suggesting that all of the adjustments are appropriate in this case, but did the calculation as an exercise only.

The Board has also looked at the comparable sales properties submitted by Mr. Gillard. As noted during the testimony, it would appear that one of these properties was a mortgage foreclosure sale and another was an estate sale. These types of sales are not normally considered open market sales and thus not suitable for comparison. In addition, Mr. Gillard only had a personal knowledge of one of the sales. There was insufficient evidence to permit these properties to be used as alternate comparable sales in using the market data approach. Consequently the Board can use this information only as a confirmation that there is, in fact, a declining market in the Town of Glace Bay. This was shown by the assessor's own testimony. Because of the nature of this testimony the Board is unable to apply the severe drops in value as desired by Mr. Gillard.

For information only, the Board has also recalculated the market data approach by applying the Regional Court's 12 1/2%

location obsolescence factor to the assessor's result. This recalculation shows a market value of approximately $50,900.00.

On review of all the evidence, the Board is of the opinion that the value arrived at by the Regional Assessment Appeal Court in the amount of $50,300.00, is in fact what a willing buyer would pay for the property as at January 1, 1986, having regards to the assessment of other properties in the Town. The Board accepts the report of Mr. MacLeod as a substantiation of this value and not as an expression of a new value for the property. In accepting the figure of $50,300.00 the Board is not denying Mr. Gillard's testimony about the falling market value in the Town of Glace Bay. It is confining this drop to the point of time picked by the Director of Assessment as required by the **Assessment Act**.

Neither party had asked for costs related to this hearing. On review of the evidence and the situations involved, the Board determines that no costs will be awarded to either party.

The Board dismisses the appeal.

An Order will be issued accordingly.

DATED at HALIFAX, Nova Scotia, this 3rd day of November, A.D., 1988.

Michael G. Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

ROYCOM SECURITIES v. DIRECTOR OF ASSESSMENT

ASSESSMENT - BUSINESS OCCUPANCY - RATE - INVESTMENT DEALER OR BROKER - OTHER FINANCIAL INSTITUTION - ASSESSMENT ACT, S.7(2)(b).

The Company was assessed 1988 business occupancy at a rate of 75% because of its apparent use for financial purposes. Other businesses are generally assessed at 50%. Company held a licence under the Securities Act for part of 1988. Company acted as an investment dealer in the past and is now performing many functions of a financial nature.

HELD: Appeal dismissed.

It would be impractical to have every company in the Province, which is licenced as an investment dealer or broker, justify the nature of its business on a regular basis. The fact that a company is licenced is justification enough.

The phrase "any other financial institution of a like nature" in Section 7(2)(b) should be interpreted broadly. The activities performed by the company are similar to those performed by most of the financial institutions listed in S.7(2)(b) and are of a like nature.

NSMB-5-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, C. 14, by **ROYCOM SECURITIES LIMITED** from a decision of the Nova Scotia Regional Assessment Appeal Court, Halifax City Assessment Region, dated May 17, 1988, which dismissed the appeal with regard to a reduction in business occupancy assessment for property occupied in Purdy's Wharf Tower.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: NANCY CAMERON, on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: October 27, 1988.

DECISION DATE: November 10, 1988.

DECISION: **Appeal Dismissed.**

DECISION

The Appellant carries on business from a rented premises located at Suite 1004, Purdy's Wharf Tower, 1959 Upper Water Street, Halifax. The Company was assessed business occupancy at 75% of the assessed value of the property because of its apparent use for financial purposes. Other businesses are generally assessed at 50%. The Notice of Appeal states that the Company would "fit into the 50% tax bracket rather than the 75% as assessed".

The Notice of Appeal was served on the appropriate people and in the required time limits.

Lewis J. Maroun, General Manager of **ROYCOM SECURITIES LIMITED**, filed the Notice of Appeal on behalf of the Company. Mr. Maroun was unable to attend the hearing on October 27, 1988. Nancy Cameron, an employee of the company, appeared on behalf of the Appellant in his place.

Ms. Cameron presented a memo (Exhibit R-1) prepared by Mr. Maroun which outlined the position of the Company relative to the appeal. The memo was set up in a format to refute the statements made by the assessor. These statements are found on page 6 of his report (Exhibit R-3) entitled "Facts Related to Assessment". Ms. Cameron briefly summarized the facts contained in the memo and indicated her own personal involvement in the operations of the company.

Ms. Cameron also presented a letter dated October 26, 1988, to Cathy F. Mason, Nova Scotia Securities Commission (Exhibit R-2). The letter stated that ROYCOM SECURITIES LIMITED did not wish to continue its registration under the **Securities Act** past its expiry date on October 31, 1988.

Barry D. Woodworth gave testimony on behalf of the Director of Assessment. After reviewing his qualifications, the Board accepted Mr. Woodworth as an expert qualified to give opinion evidence in assessment matters. Mr. Woodworth reviewed his report in some detail. He paid particular attention to the requirements of Section 7(2)(b) of the **Assessment Act** and its requirement to assess certain properties at 75% of assessed value. He reviewed the facts related to the assessment as outlined on page 6 of his report. He stated his reasons for his conclusion that "the use of the offices of ROYCOM SECURITIES LIMITED is that of a financial nature and therefore computed of the rate of 75%".

Also introduced was a folder of brochures (Exhibit R-4) obtained by Mr. Woodworth from the Company. These brochures show the activities of ROYCOM SECURITIES LIMITED together with other related companies and divisions which operate from the same location. ROYCOM REALTY LIMITED with its property management division shares the same reception area. Also listed at the same address is the ROYCOM - SUMMIT REALTY FUNDS (previously known as PAGEBROOK REALTY FUNDS). Investments in these funds are basically broken into RRSP investments or direct real estate ownership investments.

Section 7(2)(b) of the **Assessment Act** states as follows:

> "(2) Business occupancy assessment shall be computed by reference to the assessed value of the property as follows:
>
> (b) in a sum equal to seventy-five per centum of the assessed value for persons occupying or using property for the purposes of a
>
> (i) bank to which the Bank Act (Canada) applies,
>
> (ii) credit union to which the Credit Union Act applies,
>
> (iii)loan company or investment company to which the Loan Companies Act applies;
>
> (iv) trust company to which the Trust Companies Act applies,

> (v) insurance company to which the Insurance Companies Act or the Mutual Insurance Companies Act applies,
>
> (vi) investment dealer or broker to which the Securities Act applies,
>
> (vii) mortgage broker or lender to which the Mortgage Brokers and Lenders Registration Act applies,
>
> (viii) collection agency to which the Collection Agencies Act applies,
>
> and includes any other financial institution of a like nature to those listed immediately above whether or not specifically mentioned."

There is no dispute that ROYCOM SECURITIES LIMITED did in fact hold a licence under the **Securities Act**, at least until October 31, 1988. The very fact that the Company holds a licence as an investment dealer or broker would indicate to the Board that the 75% of assessed value is properly assessed to the Company. The Company has acted as an investment dealer in the past and would be entitled to do so in the future as long as it held its licence.

It would be impractical to have every company in the Province, which is licenced as an investment dealer or broker under the **Securities Act**, justify the nature of its business on a regular basis. The fact that a company is licenced as an investment dealer or broker is justification enough.

This is not the only consideration to be determined in relation to this Section of the **Assessment Act**. If it were the Company could apply for relief as provided for in the Act where a change in occupancy has occurred (i.e. surrender of licence).

However, Section 7(2)(b) has a closing paragraph which states:

> "and includes any other financial institution of a like nature to those listed immediately above whether or not specifically mentioned."

The Board sees two possible interpretations of this part of the section. One is a very strict interpretation of the phrase "of a like nature". The eight categories of companies listed are very specifically defined by the Act to which they apply. It could be argued that in order to be of a like nature the operations of a company must fall within one of these definitions.

The Board favours a much broader interpretation of this part of the Section. The addition of the phrase "whether or not specifically mentioned" indicates to the Board that the legislators, when drafting this section, were aware that the eight specifically listed were not all inclusive. There are other businesses in existence which could be classified as financial institutions of a like nature. It would be impossible and impractical to list every single one within the Act. In the Board's opinion the references in Section 7(2)(b) to the governing acts are for definition purposes only.

The Board has reviewed the memo submitted by the Appellant and notes the following quotations taken, in part, therefrom:

1. "We are restricted to the sale of real estate-related securities, limited partnerships, real estate mutual funds and other real estate-related securities".

2. "We **do not** administer real estate investment

funds. We are advisors/consultants in real estate. We perform this role for the Pagebrook Realty Funds (which are now called the Roycom-Summit Funds), and for a group of pension funds.

In the case of Summit, a real estate mutual fund, registered in Ontario, the Funds are owned, as are all mutual funds by their very nature and design, by the Unitholders. The affairs of the Funds are guided by a Board of Trustees - the majority of whom are independent of Roycom.

Roycom has a contract with the Trustees and Unitholders to provide real estate expertise and advice and administrative support services, in the acquisition, management, disposition and control of real estate and real estate portfolios.

The same holds true with the pension funds. We seek appropriate real estate purchases and on our recommendation the various pension funds advance the necessary monies to make the purchase. We then manage the assets and determine the strategic plan for holding and ultimately selling the properties."

3. "We have been any may continue to syndicate real estate projects....

A real estate syndication generally has several components and participants: the developer, promoter, syndication consultant, distributor and sales group.

The syndication consultant looks after the structuring of the deal by assembling and working with the lawyers, accountants and other participants to ensure that a viable and marketable deal is put together. The distributor may assemble and help coordinate the selling group - keeping track of the selling process, recording transactions and helping to close the deal- but may or may not choose to "sell".

In our most recent syndication project, we acted as promoter, syndication consultant and distributor."

4. "We do manage real estate assets, we are advisors and consultants on real estate. We are experts in the syndication control and acquisition of real estate and we are paid consulting advisory fees for this expertise."

A review of the brochures also showed the following under ROYCOM SECURITIES LIMITED:

> "The design, marketing and syndication of real estate investment vehicles. Direction of the national Pagebrook Realty Fund. Brokerage firms seek out and recommend real estate investment vehicles to their clients as a means of diversifying portfolios and maximizing returns. Very few securities companies, however, have the knowledge, contacts and resources required to create and syndicate reliable real estate investments. The establishment of Roycom Securities Limited in 1985 was a direct response to a need for professional expertise in this field."

The Board agrees that ROYCOM SECURITIES LIMITED is not an investment dealer/broker as normally understood. However, on review of all the evidence the Board feels that the company is performing many functions of a financial nature. It is directly dealing in the real estate investment market. It is dealing in real estate syndication as promoter, consultant, distributer and advisor. It seeks out, analyses and recommends various real estate investments. It manages investment portfolios. The company performs many more functions than a real estate agent who acts for a buyer or seller of residential or business properties. The Board feels that all of the above activities are, at least in part, similar to these performed by most of the financial institutions listed in Section 7(2)(b) and are of a like nature.

Accordingly, the Board dismisses the appeal.

Neither party addressed costs during the course of the hearing. The Board has reviewed the various factors involved and has determined that no costs will be awarded in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of November, A.D., 1988.

Michael G. Johnson

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

SPROULE v. DIRECTOR OF ASSESSMENT

ASSESSMENT - JURISDICTION OF BOARD - SERVICE OF NOTICE OF APPEAL - TIME OF SERVICE OF NOTICE OF APPEAL EXPIRED - ASSESSMENT ACT SS. 100(1).

On June 13, 1988, the R.A.A.C. handed down its decision unfavourable to S. S prepared a Notice of Appeal and did not serve anyone with a Notice of Appeal within the time limited for so serving. S "served" Notice of Appeal on the Board and thus this hearing. The Director objected to the Board's jurisdiction to hear the appeal on its merits.

HELD: The Board dismissed the appeal on the grounds of lack of jurisdiction.

Section 100(1) is extremely explicit. The Board strictly follows the Section relating to the timing of the service of the Notice of Appeal upon the parties. Three of the parties were not served with a Notice of Appeal as required by the Act. For such a brief hearing the Board will not award costs.

NSMB-7-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, C. 14, by **BEATRICE V. SPROULE** from a decision of the Nova Scotia Regional Assessment Appeal Court, Cumberland Assessment Region dated June 13, 1988, which dismissed an Appeal to reduce the assessed value of property located in West Pugwash, Cumberland County, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: ERIC SPROULE, on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., Solicitor for the Director of Assessment.

HEARING DATE: November 4, 1988.

DECISION DATE: November 10, 1988.

DECISION: **Appeal Dismissed.**

DECISION

A hearing was held on November 4, 1988, in the Council Chambers of the Municipality of the County of Cumberland. The purpose of the hearing was to determine the jurisdiction of the Board to hear an appeal by **BEATRICE V. SPROULE.** The Nova Scotia Regional Assessment Appeal Court, Cumberland Assessment Region, had dismissed an appeal of Mrs. Sproule to have the assessed value of property located in West Pugwash reduced.

Mr. Duplak presented Affidavits from Robert F. Warren, Provincial Director of Assessment, Ronald E. Borne, Regional Director of Assessment for the Cumberland Assessment Region and F. Arnold Harrison, Clerk Treasurer of the Municipality of the County of Cumberland. Each, in his Affidavit, stated that he had not been served with a copy of the Notice of Appeal. Based on the evidence the time for filing a Notice of Appeal had expired as of the dates of the Affidavits.

Mr. Sproule testified on behalf of his Wife, the Appellant. He said he was unaware of the requirement to serve people other than the Board. He confirmed that he did not serve his Notice of Appeal on anyone except the Board.

Section 100(1) of the **Assessment Act** states the following:

> "Notwithstanding the provisions of any other Act, any person aggrieved by a decision of the regional assessment appeal court may appeal by serving notice of appeal, within thirty days from the day when notice of the decision was received, on the clerk of the municipality or town in which the property is assessed if he is not that person and the person who appealed the assessment if he is not that person, and by filing a copy of the notice of appeal with the clerk of the Nova Scotia Municipal Board, and not otherwise."

The wording of Section 100(1) is extremely explicit. The Board strictly follows this Section relating to timing of services of Notices of Appeal and upon whom the Notices are to be served. (See cases **Allan MacKinnon** v. **Director of Assessment**, (1983), 2 MBD 151; **Arthur Spiropoulos** v. **Director of Assessment**, (1983), 2 MBD 174 and **Ilze Berzins (New Art Space)** v. **Director of Assessment**, (1987) (unreported NSMB-143-87-A.)

The evidence clearly shows that three of the required parties were not served with a Notice of Appeal as required by the Act. The Board does not have jurisdiction to hear the facts relating to the appeal and dismisses the appeal.

Neither party raised the question of costs during the hearing. For such a brief hearing the Board awards no costs in this case.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 10th day of November, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
Chairman.

NOVA SCOTIA MUNICIPAL BOARD.

LEVY v. DIRECTOR OF ASSESSMENT

ASSESSMENT - CHANGE OF USE ASSESSMENT - RESOURCE FARM PROPERTY EXEMPT - RESIDENTIAL PROPERTY - COSTS - ASSESSMENT ACT SS. 40A; 40A(6); 38; 40A(7).

L purchased the subject lot in 1959. It consists of two lots of 152 feet frontage on Route 3 and contains 75,000 square feet. Both lots are subject to a right-of-way to a third lot owned by L which is a summer residence. The assessor had made a change of use assessment for 1987. The Assessor testified that there had been a subdivision in 1987 and it was the policy that they assess a change of use tax when this occurs. The evidence showed that the property has been used as residential since the present owner has held it, that it was probably changed from a farm use prior to that and that in any event it was changed before 1977. The Director concurred.

HELD: The Appeal was allowed and the assessment of change of use tax made in 1987 was dismissed. No costs awarded.

A change of use had occurred prior to 1977 when the Province took over the assessment and brought in Section 40A of the Assessment Act dealing with farm property taxation and change of use taxation.

Section 40A(6) states that a change of use tax is applied at the time any land ceases to be used for agricultural purposes. Subsection (7) states that the tax shall be payable by the assessed owner at the time the change of use occurs.

No change of use took place in 1987 and Section 40A(6) should not have been applied in 1987. The appropriate classification of the property is residential.

L asked for costs. Since he had the agreement and co-operation of the Director of Assessment, L was able to use the Director's expert witness and assessment report. In such circumstances the Board awarded no costs.

NSMB-6-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An appeal under the Assessment Act, R.S.N.S., 1967, Chapter 14, by **GORDON BERT LEVY** from a decision of the Nova Scotia Regional Assessment Appeal Court, Lunenburg Assessment Region, dated June 3, 1988, which dismissed the appeal relating to a change of use assessment on property located at Mader's Cove, Lunenburg County, Nova Scotia.

BEFORE: MICHAEL G. JOHNSON, C.A., Chairman.

COUNSEL: G.F. PHILIP ROMNEY, LL.B., on behalf of the Appellant;

RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment.

HEARING DATE: DECEMBER 1, 1988.

DECISION DATE: DECEMBER 12, 1988.

DECISION: **Appeal Allowed.**

DECISION

The subject property is located on Highway No. 3, approximately one mile from the Town of Mahone Bay. Mr. Levy acquired the property in 1959. It consists of two lots. Lot B has approximately 152 feet frontage on Route 3 and contains about 75,000 square feet. A 30-foot by 40-foot wood frame storage building in poor physical condition is located on this lot. Lot

C contains approximately 50,000 square feet and has a satelite dish located on it. Neither Lot B nor C have well or septic system but each has received approval from the Department of Health. There is a Lot A containing a seasonal residence which is also owned by the Appellant. There is a 50-foot right-of-way over Lot A and B which provides access to Lot C. The only coverage on Lots B and C is that of wild growing weeds, blackberry shrubs and alder bushes.

The Board was satisfied that the Appellant had met the procedural requirements necessary to support the Board's jurisdiction to hear the appeal.

Lynn E. Wamboldt gave evidence on behalf of the Appellant. Mr. Wamboldt is Senior Assessor for the Lunenburg Assessment Region, Province of Nova Scotia. The Board accepted Mr. Wamboldt as an expert qualified to give opinion evidence in assessment matters. No witnesses were called on behalf of the Director.

Mr. Wamboldt reviewed various parts of his report (Exhibit L-1) which had been prepared in preparation for this appeal. A review of page 7 of his report shows that Mr. Wamboldt carried out a physical inspection of the property, interviewed a neighbour and searched the Registry of Deeds. No evidence was provided that the subject property is or has been used for farm purposes while owned by the Appellant.

On page 8 of his report, Mr. Wamboldt states the following:

> "It is my opinion, after having inspected the subject property and analyzed all pertinent information concerning the property use or intended use, that the classification for assessment purposes as of December 3, 1987 is Residential.
>
> Based on the above, I would conclude that the classification as shown on the 1987 Assessment Roll of Resource Farm Property Exempt was incorrect and that the issuance of a change in use dated December 3, 1987 was not justified under Section 40A(6) of the Assessment Act."

In his testimony, Mr. Wamboldt stated that the change of use assessment had been issued because subdivision approval had been given to the subject property in July, 1987. He said that it is departmental policy to issue a change of use assessment for all exempt farm land when a subdivision approval is granted.

In this particular case, subsequent investigation showed that a change of use had probably occurred on the subject land prior to the acquisition by the Appellant and certainly prior to 1977 when the Province took over the assessment duties and Section 40A on farm property taxation was added to the **Assessment Act**.

Page 3 of Mr. Wamboldt's Report includes a listing of various sections of the **Assessment Act** which he considered relevant to his report. The Board has reviewed these Sections and in particular Section 40A(6) which states:

> "In the event that any land, or any part of it, to which this Section applies, ceases to be land used for agricultural purposes, this Section shall cease to apply, and a change in use tax equal to twenty per centum of the value, determined by the assessor pursuant to Section 38, of the land or part thereof to

> which this Section ceases to apply, shall become due and payable to the town or municipality in which the land is situate, unless the land or part thereof becomes forest property to which Section 40B applies, in which case no change in use tax is payable".

In addition, the Board has also looked at the wording of subsection (7) which is as follows:

> "The change in use tax shall be payable by the assessed owner of the land or part thereof formerly subject to this Section when this Section ceases to apply, but if the use of the land is changed by a purchaser of the land, then the purchaser shall be liable for the change in use tax".

Section 40A(6) states that a change of use tax is applied at the time any land ceases to be used for agricultural purposes. Subsection (7) states that the tax shall be payable by the assessed owner at the time when the change occurs.

Based on the uncontradicted evidence before it, the Board is of the opinion that the subject property was improperly classified on the assessment rolls as resource farm property exempt. During the term of his ownership, the Appellant had never used, nor intended to use, the subject property for agricultural purposes. It is the Board's decision that no change of use took place and that Section 40A(6) should not have been applied in 1987. The appropriate classification for assessment purposes of the subject property is residential.

Mr. Romney had asked the Board to consider costs for the Appellant. In this case, with the agreement and co-operation of the Director, the Appellant was able to use the Director's expert witness and his assessment report. Under these circumstances the Board determines that no costs will be awarded in this case.

The Board allows the Appeal.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of December, A.D., 1988.

MICHAEL G. JOHNSON, C.A.
CHAIRMAN.

NOVA SCOTIA MUNICIPAL BOARD.

DIRECTOR OF ASSESSMENT v. EASCAN DEVELOPMENTS

ASSESSMENT - FOREST PROPERTY - CHANGE OF USE TAX - ASSESSMENT ACT SS. 40(B); 40(B)(6); L(fa); 89(1)(d).

In 1977 or 1978 the Director determined that subject property owned by Lewis Lumber Co. was bona fide used for forestry purposes and was classified forest property exempt. Between 1980 and 1984 the property was sold several times. Eascan required that property be subdivided prior to purchase in 1984. Previous owners were issued a sales information form but only Eascan indicated the intended use - "investment, possible development in future". Director issued change of use in 1984. Regional Assessment Appeal Court determined that there was no change in use. Director appealed.

HELD: A change of use had taken place prior to E's purchase. Property no longer forest property exempt. Assessed value $182,800.00.

The issue is not whether the land ceased to be forest property but whether it ceased to be land bona fide used or intended to be used for forestry purposes. The land must be actually used for forestry purposes or a substantial act must have occurred which supports an intent to use the property for forestry purposes. The date of change of use tax is the cessation of the existing use.

A change of use occurred prior to E taking title to the property. E is therefore not liable to pay the change of use tax. The property should not have been exempt for 1984 and could have been assessed. The Board is not in a position to determine on the evidence submitted which of the previous owners changed the use of the property.

NSMB-8-88-A

NOVA SCOTIA MUNICIPAL BOARD

IN THE MATTER OF: An Appeal under the Assessment Act, R.S.N.S. 1967, c. 14, as amended, by the **DIRECTOR OF ASSESSMENT** from a decision of the Annapolis-Digby Regional Assessment Appeal Court, dated May 31, 1988 which decision found that there had not been any change in use of property in Digby County owned by **EASCAN DEVELOPMENT CORPORATION LTD.**

BEFORE: LINDA D. GARBER, Vice-Chairman.

COUNSEL: RANDALL R. DUPLAK, Q.C., on behalf of the Director of Assessment, Appellant,

WILLIAM L. RYAN, Q.C., on behalf of EASCAN DEVELOPMENT CORPORATION LTD., Respondent.

HEARING DATE: November 16, 1988.

DECISION DATE: December 12, 1988.

DECISION

This appeal concerns Section 40B of the **Assessment Act.** Under that section "forest property bona fide used or intended to be used for forestry purposes" is exempt from taxation except for a forest property tax. If the forest property "ceases to be land bona fide used or intended to be used for forestry purposes", it is no longer exempt and in addition, the owner is subject to a change of use tax.

EASCAN Development Corporation Ltd., on April 18, 1984, took title to 31 lots of forest property in the area of Sprague Lake and Dunbar Lake, near Danvers, Digby County. The conveyance was part of a property transaction under which B.V. Property Management Ltd. purchased a building in Halifax from A.E.A. Properties Ltd. As part of the purchase price, B.V. Property Management Ltd. conveyed the 31 lots to EASCAN, a company related to A.E.A. Property Ltd.

A brief history of the ownership of the property according to the Registry of Deeds is as follows:

Date of Purchase	Purchaser	Amount of Property
May 30, 1956	Lewis Lumber Company	all (385 acres)
Mar. 31, 1980	Nova Recreation Development Co. Ltd.	all
Apr. 8, 1980	Michael I. King In Trust	all
Oct. 28, 1980	Alvarine Austalt	eastern 138.7 acres
Oct. 28, 1980	B.V. Property Management Ltd.	western portion
Apr. 3, 1984	B.V. Property Management Ltd.	eastern 138.7 acres
Apr. 18, 1984	EASCAN Development Corp Ltd.	31 lots, excluding proposed roads
May 5, 1986	EASCAN Dev. Corp. Ltd.	18 1/2 acres — proposed roads.

Murray Harris, Director of Assessment, testified that in 1977 or 1978 the Assessment Office sent out forms to the owners of resource property requesting information about the use of the property. On the basis of the information provided by the then owner, Lewis Lumber Co., it was determined that the subject property was then being bona fide used for forestry purposes.

Mr. Harris further testified that when the property was purchased by ESCAN's predecessors in title, Michael King In Trust, Alvarine Austalt and B.V. Property Management Ltd., a Sales Information Request Form was forwarded to each. All returned the forms except Alvarine Austalt. Mr. Harris did not believe that a form was sent to Nova Recreation Development Co. Ltd.

Mr. Harris testified that neither Michael King In Trust, nor B.V. Property Management Ltd. indicated on the Sales Information Request Form what its intended use of the property was. There is no evidence that the Assessment office made any further attempt to obtain that information from either of them.

A similar form was forwarded to EASCAN on May 15, 1984. Evan Wentzell, principal shareholder of EASCAN, completed the form and returned it. He wrote on the form that 385 acres had been purchased at an approximate cost of $200,000.00 and the intended use was "Investment, possible development in future".

When the deed to EASCAN was recorded at the Registry of Deeds on April 24, 1988, a plan of subdivision, Sprague Lake Subdivision, was also filed. This plan is dated April 2-14, 1984, and was surveyed by R.L. Hunt Survey Associates Ltd.

On December 21, 1984 the Director of Assessment issued to the Respondent a Notice of Change of Use of the subject property from exempt forest resource and set a valuation of $183,530.00. The change of use tax was set at $36,706.00 being

20% of the value of the property.

In his report (Exhibit E-1), Mr. Harris stated his reasons for issuing the Notice of Change of Use, which are as follows:

> "- The property owner [Lewis Lumber] carried on an active forest management from 1956 until the latter part of the 1970's, which included a selected cut during the early 1950's.
>
> - From April 2nd to 14th of 1984, the firm of R.L. Hunt Surveyors Associates Limited was retained to survey the property, dividing it into 31 recreational lots.
>
> - The subject property was sold on the open market at a price which yielded approximately $540 per acre. This price is indicative of values paid for forest land with recreational purposes as opposed to approximately $100 to $150 per acre for forestry purposes.
>
> - The property was sold on April 18, 1984 for $200,000.
>
> - The purchaser has no known association with the forestry industry and indicated on the Sales Information Request Form that the intended use was for "Investment, Possible Development in Future"."

EASCAN took the position from the issuing of the Notice of Change of Use that it had not changed the use and that the land was forest property. A Notice of Appeal to the Regional Assessment Appeal Court was filed in early 1985.

For reasons unknown to the Board, this appeal was not heard by the Annapolis-Digby Regional Assessment Appeal Court until May 17, 1988. A decision holding that there had not been a change of use was signed on May 31, 1988 and mailed on June 22, 1988. The Director of Assessment appealed the decision on June 29, 1988.

Subsection (6) of Section 40B provides that the change in use tax becomes due and payable when forest property ceases to be land bona fide used or intended to be used for forestry purposes. Section 1(fa) of the Assessment Act defines "intended to be used" as meaning "a present intent supported by some substantial act to carry out the intent". It should be noted that the issue is not whether the land ceased to be forest property but whether it ceased to be land bona fide used or intended to be used for forestry purposes. This means that the land must be actively used for forestry purposes or a substantial act must have occurred which supports an intent to use the property for forestry purposes.

In Green Meadows Estates Ltd. v. Director of Assessment et al (1984), 26 M.P.L.R. 33 (N.S.C.A.), the Appeal Court held that the date for the change of use tax is not when a new use takes effect but on the cessation of the existing use. While that case involved a change of use from farm land to residential, the applicable section is similar to s. 40B.

Wayne Harvie, Solicitor for EASCAN at the time of the conveyance, testified that he had some discussion with Mr. Wentzell about cutting the timber on the property. He has no knowledge that any timber was cut or that any other active forestry activity took place on the property in 1984.

Mr. Harris testified that he was on the property in April 1988 and that there was no evidence of recent cutting other than for purposes of doing a survey. Included in Exhibit E-1 are photographs which show tree stumps covered in moss. Mr. Harris also testified that at the hearing before the Regional Assessment Appeal Court, there was evidence given that ESCAN had not undertaken any forestry activity on the property except that in 1985 it entered into a forest management plan with the Department of Lands and Forests. This action is subsequent to the Notice of Change of Use and in the Board's opinion is not relevant to this decision. EASCAN's position has been that they did not change the use from that of the previous owner, B.V. Property Management Ltd.

Mr. Harris conducted a search at the Registry of Deeds. At the request of Mr. Ryan, five earlier plans of the property prepared by R.L. Hunt were introduced as Exhibits E-6 to E-10. All these plans are marked as Plan No. 1203. The first two plans show the exterior boundaries and were filed in the Registry of Deeds in 1980. They are both described as property surveyed for Nova Recreation & Development Co. Ltd.

On April 25, 1983, the same plan, revised on November 27, 1980 to show a 31-lot subdivision proposal and a partial road survey (Apr. 23-24, 1984) was filed at the Registry of Deeds. This plan is identified as Plan of Survey Showing Property of B.V. Property Management Ltd. The same lot lines and the same acreage is indicated on this survey plan as that filed on April 24, 1984 with the deed to EASCAN. The only differences are that on the EASCAN Plan the survey markers for the individual lots are shown and it is identified as Sprague Lake Subdivision, Plan D-

On March 15, 1984, Plan 1203 without the partial road survey revision, was filed under the name Plan of Survey Showing Property Surveyed for Nova Recreation & Development Ltd. Again the 31 lots are identical with the ESCAN Plan.

On April 3, 1984, another copy of Plan 1203 showing the subdivision and the partial road survey was filed under the name of B.V. Property Management Ltd. This appears to be identical with the plan filed on April 25, 1983.

The evidence before the Board indicates that none of the owners of the property subsequent to Lewis Lumber Co. were using the property for forestry purposes or intended to so use it. Alvarine Austait is a corporate body incorporated under the laws of Lietchenstein. Mr. Harvie testified that Michael King had held the property in trust for German interests and that B.V. Property Management Ltd. was also owned by German interests.

The proposed subdivision was originally drawn on November 27, 1980 for Nova Recreation & Development Co. Ltd. One copy was filed in the Registry of Deeds on April 25, 1983, a year before EASCAN purchased the property.

The agreement under which EASCAN obtained the property required a valid subdivision of the property in place by March 19, 1984. The deed which EASCAN received was for 31 separate lots. EASCAN wanted to have the subdivision in place prior to the new subdivision regulations coming into effect.

The Board is satisfied that in 1984 the property was not being bona fide used for forestry purposes nor was it intended to be used. The land was not being used for forestry purposes and there is no evidence of a substantial act to show a future intention.

In the Board's opinion a change of use occurred prior to EASCAN taking title to the property. Section 40B(7) of the Act provides that the change of use tax is payable by the assessed owner at the time the use is changed unless the use is changed by the purchaser of the land. See Van Tassell v. Director of Assessment (1984) 3-A M.B.D. 142. The evidence of EASCAN is that it did not use the land any differently than it had been used by the previous owner.

The Board is satisfied that the use of the land was changed prior to EASCAN purchasing the property. EASCAN is therefore not liable to pay the change of use tax. However, the subject property should not have been classified as exempt for 1984 and could have been assessed appropropriately as provided for by various sections of the **Assessment Act**.

The Solicitor for the Director of Assessment at a prehearing conference and at the commencement of the hearing of the appeal requested that the Board adjourn the hearing so that the previous owners could be served with Notice of the Hearing. He argued that the Board had power under Section 89(1)(d) of the **Assessment Act** to substitute the name of the previous owner who changed the use for that of EASCAN if the Board found that EASCAN had not changed the use. The Board did not accede to his request. The Director of Assessment was, of course, free to serve the Notice of Appeal on any party it wished. The previous owners were not served.

In this case, the Board is not in the position to determine on the evidence submitted which of the previous owners changed the use of the property from exempt forest property to non-exempt forest property. This is, therefore, not an appropriate case for the Board to act under Section 89(1)(d).

The Respondent did not challenge or contradict the Assessor's Report (Exhibit E-1) or Mr. Harris's testimony with respect to the valuation which he had placed on the property. The Board is satisfied that the assessed value on April 18, 1988 is $182,800.00.

An Order will issue accordingly.

DATED at HALIFAX, Nova Scotia, this 12th day of December, A.D., 1988.

Linda Garber

LINDA GARBER
Vice-Chairman.

NOVA SCOTIA MUNICIPAL BOARD.